

A Critique of the Emerging Convention on the Rights of the Child

Walter H. Bennett Jr.

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>



Part of the [Law Commons](#)

Recommended Citation

Bennett, Walter H. Jr. (1987) "A Critique of the Emerging Convention on the Rights of the Child," *Cornell International Law Journal*: Vol. 20: Iss. 1, Article 1.

Available at: <http://scholarship.law.cornell.edu/cilj/vol20/iss1/1>

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CORNELL INTERNATIONAL LAW JOURNAL

Volume 20

Winter 1987

Number 1

ARTICLES

A CRITIQUE OF THE EMERGING CONVENTION ON THE RIGHTS OF THE CHILD

Walter H. Bennett, Jr. †

CONTENTS

I. INTRODUCTION.....	3
II. OUTLINE OF THE CONTENT OF THE CONVENTION	4
III. THE DEVELOPMENT OF CHILDREN'S RIGHTS IN COMPARATIVE HISTORICAL CONTEXT	15

† Lecturer, School of Law, University of North Carolina at Chapel Hill; Juvenile Court Judge, Charlotte, North Carolina, 1977-1983; Practitioner of Juvenile and Domestic Law, 1983-1986; A.B., Washington & Lee University (1965); M.A., University of North Carolina at Chapel Hill (1969); J.D., University of Virginia (1972); LL.M. (with emphasis in International Law and International Human Rights), University of Virginia (1986).

The author wishes to thank Professor Richard B. Lillich for his advice and guidance in the preparation of this Article.

IV.	CURRENT STATUS OF INTERNATIONAL CHILDREN'S RIGHTS AND THE ISSUE OF THE NEED FOR A CONVENTION	18
A.	Current Status of Children's Rights in International Instruments	18
1.	The United Nations Declaration of the Rights of the Child	18
2.	Multilateral Instruments Dealing in Part With Children's Rights	20
3.	Human Rights Treaties	26
B.	The Necessity for a Children's Rights Convention	29
V.	THE IMPLICATIONS OF THE LATE DEVELOPMENT OF CHILDREN'S RIGHTS UPON INTERNATIONAL IMPLEMENTATION	31
VI.	THE APPROACH OF THE CONVENTION DRAFTERS TO THE INTERNATIONALIZATION OF THE EMERGING PRINCIPLES AND IDEALS OF CHILDREN'S RIGHTS	34
A.	Options for Promoting a Children's Rights Agenda	34
B.	The Legislative Impulse and its Consequences	35
1.	Policy-ization of Children's Rights	36
a.	Vagueness	36
b.	Overbreadth	37
c.	Lack of Comprehensive Planning	38
d.	Dilution of Established Rights	39
2.	Lack of Comprehensive Planning: Rights in Conflict	40
3.	Lack of Consensus and Danger of Non-acceptance	41
4.	Conclusions on the Legislative Approach	42
VII.	SUGGESTIONS FOR RECTIFYING SOME OF THE ORGANIZATIONAL AND TEXTUAL PROBLEMS	43
A.	Organization: Determining the Effect of Existing Conventions	43
B.	Content: Correcting the Problems of Conflicting Rights and Inclusion of Rights of Questionable Merit	45
1.	Combatting Vagueness, Overbreadth, and Conflicting Rights	46
2.	Minimizing the Diluting Effect of Questionable Rights	46

VIII. CONCLUSION 48

I. INTRODUCTION

After its eighth session in Geneva in March, 1986, the Working Group on the Convention on the Rights of the Child [hereinafter "Draft Convention" or "Convention"] is nearing completion of a first draft.¹ Although it is too early to render a final judgment on this labor, one can discern the emerging form and outline of the document, its inclinations, and its underlying legal, social, and philosophical perceptions. A broad-ranging social statement on the physical, intellectual and emotional needs of children is beginning to appear. The statement is sometimes couched in terms of children's rights, sometimes in terms of duties of States Parties, and occasionally in terms of parental duties.²

The purpose underlying the Convention is beyond reproach. The emerging draft shows laudable advances in the assertion of children's rights and illuminates areas of particular concern in the care and protection of children.³ However, despite the honorable purpose and prodigious effort of the drafters, there are problems in what is taking shape. This Article addresses these emerging problems. The Article closely examines the emerging document and raises basic questions

1. The Working Group, established by the United Nations Commission on Human Rights at its Thirty-Fifth Session, 35 U.N. ESCOR Supp. (No. 6) at 60, U.N. Doc. E/CN.4/1347 (1979), has met yearly since that date. By the end of the 1986 session, thirty articles of a draft convention were completed in whole or in part, and most of the substantial areas proposed in preliminary drafts and proposals had been covered. Compare the text of articles completed in draft, Text of the Draft Convention on the Rights of the Child adopted by the Working Group, — U.N. — Annex I, U.N. Doc. E/CN.4/1986/39 [hereinafter Draft Convention] with the primary working paper, the "Revised" Polish Draft, 36 U.N. ESCOR (Agenda Item 13), U.N. Doc. E/CN.4/1349 (1980) [the text of the Draft Convention appears in Appendix II *infra*].

2. It is something of an anomaly for a multilateral convention to impose duties upon individuals. Two notable exceptions are the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, and the Convention Against Torture, *opened for signature* Dec. 10, 1984, G.A. Res. 39/46, 39 GAOR Supp. (No. 51) at 197-201 (1985). One article in the Draft Convention imposes such a duty. See Draft Convention, *supra* note 1, art. 14, para. 2 ("The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development").

3. See, e.g., Draft Convention, *supra* note 1, art. 2. Article 2 rises above both article 15 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 74 (1948), and Article 24 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), by guaranteeing a method that secures the right to nationality: It is determined by country of birth if one is not a national under the laws of another state. It is also commendable that the Convention attempts to establish rights for children that are specifically related to their status and needs; see, e.g., Draft Convention, *supra* note 1, art. 6, para. 3 (right to contact with separated parents); art. 8 (right to protection from abuse); and art. 9 bis (right of child to preserve identity with family).

about its structure and content, as well as whether a convention is the best approach to implementing international children's rights. Although a decision has already been made on this latter issue—a decision that this Article accepts as a *fait accompli*—I believe that examination of the issue bears upon the organization and content of the Convention as well as implementation of international human rights in other areas.

The organization of this Article is as follows: Section II examines the contents of the Draft Convention itself. Section III surveys the historical development and current international status of children's rights. Section IV examines the need for a children's rights convention in that context. Section V analyzes the implications of the relatively late development of children's rights upon international implementation. Section VI critiques the legislative approach to implementation implicit in the Draft Convention and identification of the problems resulting from that approach. Finally, Section VII provides proposals for addressing some of the larger organizational and structural problems identified.

II. OUTLINE OF THE CONTENT OF THE CONVENTION

There is no quick introduction to the content of this as yet basically unstructured and expanding convention because the articles are not organized by subject matter. The simplest approach to familiarizing the reader with the Convention's content is to identify each draft article by number and subject matter and to comment briefly and critically, where appropriate, upon its content. More detailed commentary on some of these articles will appear at later points in this discussion.

Article 1. *Definition*: The Convention defines a child as "every human being to the age of 18 unless, under the law of his State, he has attained his majority earlier."⁴

Article 2. *Rights to Name and Nationality*: This article of the Convention recognizes the child's rights to name and nationality from birth and, most important, provides a method to ensure the latter.⁵

Article 3. *General Guidelines*: The central theme of this article is difficult to ascertain. Paragraph 1 designates the best interests of the child as the paramount consideration in all actions concerning children.⁶ Paragraph 2 provides for the child's right to be heard in proceedings affecting his welfare.⁷ Under paragraph 3, States Parties

4. Draft Convention, *supra* note 1, art. 1.

5. *Id.* art. 2; *see also supra* note 3.

6. Draft Convention, *supra* note 1, art. 3, para.1.

7. *Id.* para.2.

undertake to ensure protection and care of children.⁸ Paragraph 4 instructs States Parties to ensure proper supervision of persons responsible for child care institutions.⁹

Article 4. *Non-discrimination*: Article 4 prohibits discrimination on a number of bases, including race, color, sex, and language, in regard to rights contained in the Convention.¹⁰ It also wisely prohibits discrimination against children that is based upon the status or activities of their parents, guardians or other family members.¹¹

Article 5. *Undertaking of States Parties to Implement the Convention*: Articles roughly equivalent to this one are standard in multilateral human rights conventions.¹² Article 5 limits the State's duty to implement the rights recognized in the Convention, imposing the duty "in accordance with [the State's] resources."¹³ Although this qualifier is standard in conventions proclaiming social and economic rights, it is unusual in conventions devoted to civil and political rights.¹⁴ In this Convention, where both types of rights are present, the qualifier unnecessarily limits the State's duty to implement civil and political rights.

Article 6. *Residence, Right to Parental Care and Parental Contact*: This article is central to the subject matter of the Convention because it concerns the relative parental and State roles in the physical possession and raising of the child. This theme recurs throughout the Convention, even though its presentation frequently lacks clarity.¹⁵ In article 6, it is framed in terms of the child's residence and parent-child

8. *Id.* para. 3.

9. *Id.* para. 4.

10. *Id.* art. 4.

11. *Id.*

12. See, e.g., The International Covenant on Civil and Political Rights, *supra* note 3, at 53, art. 2; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, G.A. Res. 2200 (XIX), 21 U.N. GAOR, Supp. (No. 16) at 49-50, U.N. Doc. A/6316 (1966).

13. Draft Convention, *supra* note 1, art. 5.

14. See, e.g., the two articles from the International Covenants, *supra* note 12; see also Convention Against Torture, *supra* note 2, art. 2; Genocide Convention, *supra* note 2, art. V, and the International Convention on the Elimination Of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 2, 660 U.N.T.S. 195, 216-18, as examples of "undertakings" articles in conventions conferring civil rights that *do not* contain the "available resources" qualifier. Although a recognition of limitations based upon resources may be appropriate for implementing at least some economic and social rights, it hardly seems appropriate where basic civil rights are concerned. As part of article 5 in the Draft Convention, *supra* note 1, the resources limitation applies to all the rights recognized in the Convention, including the right against nondiscrimination recognized in draft article 4, the right to free expression in draft article 7, and freedom of thought, conscience and religion in draft article 7 bis. It is difficult to imagine how lack of resources could ever legitimately excuse denial of free speech or freedom of conscience or religion, and it has a rather sordid history of use as an excuse for illegal discrimination. Its inclusion in draft article 5 is an invitation to noncompliance with articles to which it has no logical application and serves no beneficial purpose.

15. See Draft Convention, *supra* note 1, arts. 6, 6 bis, 7 bis-12, 14, 15, 19.

contacts.¹⁶ As will be discussed later in greater detail, the Convention engenders confusion by failing to sufficiently identify the parent's rights and to relate those rights to the rights of the child.

Article 6 bis. *States Parties' Obligations to Consider Applications to Enter and Leave; Rights to Contact Between Parents and Children Residing in Different States*: Under paragraph 1 each States Party has an obligation to deal "humanely" with applications to immigrate.¹⁷ The Convention's use of such maleable language, this Article will argue, often conceals the right for which protection is sought and casts a pall of vagueness over many of the articles in the Convention.¹⁸

Article 6 ter. *Illicit Transfer (Abduction) of Children Abroad*: This article requires States Parties to take appropriate measures to prevent and remedy international child abduction,¹⁹ and to provide international conventions toward that end.²⁰

Article 7. *The Right to Free Expression*: States Parties must "assure" the right of a child "capable of forming his own views" to express them in "all matters, the wishes of the child being given due weight in accordance with his age and maturity."²¹

Article 7 contains numerous problems. First, the attempts to qualify the child's right based upon incapacity are redundant and, arguably, superfluous because giving "due weight" to the speech of children necessarily implies that States will consider the capacity of the child to form his own views. Second, a guarantee of free speech to children does not ensure that their speech will be heeded or given any weight at all. Why should not children, as with all people, enjoy unfettered free speech regardless of capacity?²² Finally, article 7 of the Convention provides no standards for making the essential determination of the child's capacity to form his own views other than the subjective determination by some undesignated decision-maker.²³

16. *Id.* art. 6.

17. *Id.* art 6 bis, para. 1. "[A]pplications by a child or his parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner." *Id.*

18. See *infra* text accompanying note 150.

19. Draft Convention, *supra* note 1, art. 6 ter, para. 1.

20. *Id.* para. 2.

21. *Id.* art. 7.

22. The *travaux préparatoires* to draft article 7 shed little light on this question. The primary working document for the earlier drafting sessions, contained the "capable of forming his own views" qualifier. Polish Draft, *supra* note 1, at 3. The second, and I believe redundant, qualifier, "due weight in accordance with age and maturity," was added apparently to contain the sweep of "all matters" that, in the Polish draft, was a more limited and specific list of subjects (marriage, education, choice of occupation, etc.). *Report of the Working Group on the Draft Convention on the Rights of the Child*, 37 U.N. ESCOR (Agenda Item 14) at 13-14, U.N. Doc. E/CN.4/L.1575 (1981) [Hereinafter *Report of the Working Group*].

23. It is of course unclear from the article who is to decide the child's capacity to form opinions and who is to weigh the speech. Is this article directed solely at the State, to the

Article 7 bis. *Freedom of Thought, Conscience and Religion*: This article requires each State Party merely to "respect" the child's right to freedom of thought, conscience and religion,²⁴ the "rights and duties" of parents to direct the child in the exercise of his religious rights,²⁵ and the liberty of parents and child to choose the child's moral and religious education.²⁶ Although paragraph 2 states the child's rights in expansive terms, "to have or to adopt a religious or whatsoever belief of his choice,"²⁷ the nonprohibitory nature of the directive to the State, and the confusion over the relative prerogatives of the parents and the child to control the child's religious practices, training, and education, cloud the clarity of the stated right.

Much more will be said later in this Article upon the content and structure of article 7 bis, particularly the potential conflict between the rights of the parent and those of the child, as well as the relatively undefined role of the State.

Article 8. *Primary Duty of Parents to Raise Child; Duty of States Parties to Assist*: As previously noted, there is confusion over whether this article in fact assigns a duty to the parents *vis-a-vis* the child, or attempts to protect the prerogative of the parents from state interference.²⁸ This confusion obfuscates article 8's central theme. The article drifts from general statements on the parents' duties of child care and development, and the duties to assist in that care and development, to more specific state duties to provide and regulate child care services.

Article 8 bis. *Obligations to Protect Children from Abuse and Neglect*: This article generally requires that States undertake "all appropriate . . . measures" to protect children from neglect and abuse, and suggests types of protective measures. Because abuse and neglect constitute one of the world's most persistent social dangers to children, this article should make more specific suggestions for States to protect their children. Such specificity would add strength to an otherwise weak provision, although it may also endanger the process of State acceptance of the Convention.

Article 9. *Child's Right to Receive Information*: This article emphasizes the child's right of access to a balanced and healthful vari-

parents, or to all listeners? The *travaux préparatoires* suggest that at least some of the drafters felt this article was mainly directed at parents. See *Report of the Working Group*, *supra* note 22, at 13. If this is so, how can a state "assure" such a right? What implications do attempts by a state to assure such a right have for family unity?

24. Draft Convention, *supra* note 1, art. 7 bis, para. 1.

25. *Id.* para. 3.

26. *Id.* para. 4.

27. *Id.* para. 2.

28. See *supra* note 2.

ety of information.²⁹ However, article 9's overemphasis on the role of the media and the State to actively influence and control information the child receives partially derails the article's central objectives. There is a serious question whether the State should have any role in regulating the information available to children from sources outside the State itself other than the prevention in paragraph 9(d) of dissemination to children of physically dangerous or emotionally injurious material.

Article 9 bis. *Child's Right to Identity (including nationality, home, and family relations)*: This article overlaps several others, notably articles 2, 6, and 6 bis. For organizational purposes, it should be combined with one or more of those articles, especially article 2, which deals with the rights to name and nationality.

Article 10. *Duty of States Parties to Protect Children Deprived of Parents*: This article requires States Parties to provide alternative care for children deprived of parents,³⁰ but misses an opportunity to endorse placement, wherever possible, in a family-like setting, as opposed to frequently less-individualized institutional care.³¹

Article 11. *Duty of States to Facilitate Adoption*: Adoption, as an alternative to permanent care by natural parents or the State, is closely related to the subject of article 10. Article 11 succeeds where article 10 fails in emphasizing preference for child care in a family-like setting. Therefore, combining articles 10 and 11 might enhance organization of the subject of alternative care in the Convention and provide more direction in the type of care preferred.

Article 11 bis. *Entitlement of Children to Refugee Status Under Applicable Conventions and to State and International Refugee Assistance*: The purpose of this article, to ensure that children are not over-

29. Draft Convention, *supra* note 1, art. 9.

30. *Id.* art. 10.

31. The preference for the family and family-like settings over standard institutional care is now predominant social theory. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 13-15 (1973); Lowry, *When the Family Breaks Down*, in *CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES* 53 (P. Vardin & I. Brody eds. 1979). The value of the family as the basic unit of society is also endorsed in international human rights instruments. See, e.g., Universal Declaration of Human Rights, *supra* note 3, art. 16, para. 3; International Covenant on Economic Social and Cultural Rights, *supra* note 12, art. 10, para. 1; International Covenant on Civil and Political Rights, *supra* note 3, art. 10, para. 1; American Convention on Human Rights, Nov. 22, 1969, art. 17, para. 1, O.A.S.T.S. No. 36, at 55, O.A.S. Off. Rec. OEA/ser. L/V/II.23 doc. 21 rev. (1968); American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23, doc. 21, rev. 6 (1980); African Charter on Human and People's Rights, June 27, 1981, O.A.U. Doc. CAB/LEG /67/3 Rev. 5, *reprinted in* 21 I.L.M. 58 (1982); see also Conference on Security and Co-operation in Europe: Final Act (Helsinki Accords), Aug. 1, 1975, 14 I.L.M. 1293, 1314 (although not a treaty, it expresses the mutual undertaking of the signatory states to implement measures to facilitate reunification of families whose members are separated by national boundaries).

looked in the refugee process and receive refugee assistance,³² is commendable. If States adopt article 11 bis, it would encourage them to adhere to the Convention Relating to the Status of Refugees³³ and the accompanying Protocol Relating to the Status of Refugees.³⁴ However, to qualify as refugees, children would have to meet the Refugee Convention definition of "refugee," which requires a "well-founded fear" of racial, religious, or political persecution.³⁵ This definition is generally more suited to adults than to children, particularly in regard to political persecution. A children's rights article on refugee status should at least require States to grant refugee status to children whose parents qualify, regardless of whether the children themselves meet the Refugee Convention definitions.³⁶

Article 12. *Right of Mentally or Physically Disabled Child to Special Care:* This article would obligate States Parties to "encourage and ensure" extension of "appropriate" special care to mentally or physically disabled children.³⁷ Like several other provisions in the Convention, article 12 emphasizes highly desirable social policy directed at laudable goals, but does not follow through with specific and enforceable standards. The article does attempt to set a standard of equal access to disability assistance for children by requiring that the assistance provided be "free of charge," but the qualifiers "whenever possible" and "taking into account the financial resources of the parents or others caring for the child" cloud the effectiveness of that provision.³⁸

Article 12 bis. *Right of Child to Good Health and Medical Care:* The States Parties recognize the child's right to the "highest attainable standard of health," and access to medical rehabilitation facilities.³⁹ In addition, the States Parties agree to implement the right⁴⁰ and to ensure that financial considerations do not prohibit the child's access to health care.⁴¹ Paragraph 2 lists specific goals such as reducing infant mortality⁴² and improving care for expectant mothers.⁴³

32. Draft Convention, *supra* note 1, art. 11 bis.

33. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

34. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

35. Convention Relating to the Status of Refugees, *supra* note 33, arts. 1, 33.

36. Under current treaty law and international practice, individual States control the grant of asylum and refugee status to family members. For example, among European countries, asylum is generally extended to members of an asylee's "nuclear family," but there is no uniformity in granting those persons refugee status. See EUROPEAN CONSULTATION ON REFUGEES AND EXILES, ASYLUM IN EUROPE 15 (1983).

37. Draft Convention, *supra* note 1, art. 12, para. 2.

38. *Id.* para. 3.

39. *Id.* art. 12 bis, para. 1.

40. *Id.* para. 2.

41. *Id.* para. 1.

42. *Id.* para. 2(a).

43. *Id.* para. 2(c).

Article 12 ter. *Right of Child Placed in Alternative Care to Periodic Review of Placement and Treatment in Alternative Care Centers:* History teaches that, in any system of alternative placement of children for purposes of mental or physical health, periodic review of placement and treatment is essential in order to ensure proper care and prevent indefinite "warehousing." The drafters have recognized the importance of placement review and included it prominently in the Convention.⁴⁴

Articles 13 and 14. *Right of Child to Benefit from Social Security; Right of Child to an Adequate Standard of Living:* These articles impose obligations on States Parties to provide social security⁴⁵ and to assist parents in providing an adequate standard of living.⁴⁶ However, articles 13⁴⁷ and 14⁴⁸ condition those obligations on the availability of funds and national resources. Moreover, it is unclear whether article 14 places a duty upon the parents that corresponds to the child's right to development, or merely protects the parent's primary responsibility for the child's welfare from State interference.⁴⁹

Articles 15 and 16. *Right to Education; Goals of Education:* Article 15 contains provisions now standard in international instruments dealing with the right to education, including free and compulsory primary education, and equal access to secondary, vocational, and higher educational facilities.⁵⁰ In addition, paragraph 2 requires States Parties to "take all appropriate measures to ensure that school discipline is administered in a manner reflective of the child's human dignity."⁵¹ Neither the text nor the *travaux préparatoires* reveal whether this provision is intended to ban corporal punishment of school children, or is limited to corporal punishment.⁵² It also appears that this provision duplicates in part draft article 19, paragraph 2 of the Convention, which prohibits torture, and cruel, or degrading treatment or punishment of children.⁵³

44. *Id.* art. 12 ter.

45. *Id.* art. 13.

46. *Id.* art. 14.

47. *Id.* art. 13, para. 2.

48. *Id.* art. 14, paras. 2, 3.

49. See *supra* note 2 and accompanying text.

50. *Id.* art. 15; see also Universal Declaration of Human Rights, *supra* note 3, art. 26; International Covenant on Economic, Social and Cultural Rights, *supra* note 12, art. 13; Convention Against Discrimination in Education, Dec. 14, 1960, art. 4, 429 U.N.T.S. 93.

51. Draft Convention, *supra* note 1, art. 15, para. 2.

52. See 41 U.N. ESCOR Comm. on Human Rights (Agenda Item 13) at 14-15, U.N. Doc. E/CN.4/1985/64 (1985).

53. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights], corresponds to Draft Convention, *supra* note 1, art. 19, para. 2(a), on the subject of torture and degrading treatment or punishment. The European Court of Human Rights held that article 3 of the European Convention on Human Rights applied to the birching of

Paragraph 1 of article 16 makes a general policy statement that education should develop a child's personality and talents,⁵⁴ prepare him for a "responsible life in a free society,"⁵⁵ and develop respect for the principles of the United Nations Charter.⁵⁶ The provision, however, contains no reference to children's rights. A general statement is appropriate for a non-binding United Nations resolution on education, or perhaps a multilateral convention on education, but is of questionable value in a children's rights convention. Paragraph 2 preserves the "liberty of individuals and bodies" to establish educational institutions that conform to minimum educational standards and the principles set forth in paragraph 1.⁵⁷ Like paragraph 1, paragraph 2 also encourages educational institutions that are alternatives to those provided by the State, but contains no children's rights.⁵⁸ It also is of questionable value in this Convention.

Article 17. *Right to Rest, Leisure and Recreation, and to Participate in Cultural and Artistic Life*: A subsequent portion of this discussion addresses in detail the utility of the rest and leisure portion of article 17.

Article 18. *Right to Protection from Economic Exploitation and from Performing Hazardous Work*: This article would require States Parties to set a minimum for age,⁵⁹ hours, and conditions of employment.⁶⁰ Although the subject of this article is central to children's rights, these safeguards, and general admonition against economic exploitation of children, are not enough.⁶¹ Article 18 does little to

a fifteen-year-old schoolboy on the Isle of Man. Tryrer Case, 1978 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 654; *see also* Campbell & Cosens v. United Kingdom, 48 Eur. Ct. H.R. (sec. B) (1982). There is no reason to believe that the similar provisions of article 19 of the Draft Convention would not apply to school discipline cases as well. For a general discussion of the rights of children in school discipline cases under both domestic and international law, *see* Cohen, *Freedom from Corporal Punishment: One of the Human Rights of Children*, 2 HUM. RTS. ANN. 95 (1984).

54. Draft Convention, *supra* note 1, art. 16(a).

55. *Id.* art. 16(b).

56. *Id.* art. 16(c).

57. *Id.* art. 16, para. 2.

58. *Id.*

59. *Id.* art. 18, para. 2(a).

60. *Id.* para. 2(b).

61. These safeguards are already the subject of other multilateral conventions. Numerous conventions of the International Labor Organization deal with minimum age for employment and working conditions of children. Many of these are identified and discussed in more detail *infra*. One important regional convention deals in specific detail with these subjects: European Social Charter, Oct. 18, 1961, art. 7, Europ. T.S. No. 48. Nevertheless, the drafting of the Convention presents a valuable opportunity to construct a strong, international standard against economic exploitation of children. *See* J. BOYDEN & A. HUDSON, CHILDREN: RIGHTS AND RESPONSIBILITIES 7-8 (Minority Rights Group, Report No. 69, 1985). This report documents extensive and brutal economic exploitation of children, from employment of seven-year olds in Moroccan carpet factories to use of children in pornographic enterprises and prostitution. *Id.*

establish any universal, concrete understanding of what "exploitation" entails. It would have far more utility and import if the drafters used meaningful terms and standards that speak directly to exploitive practices.⁶²

Article 18 bis. *Duty of States Parties to Protect Children from Use of Illegal Narcotic and Psychotropic Substances and From Employment in Illegal Substance Production and Trafficking*: This article looks to "relevant international treaties"⁶³ to determine the controlled substances it addresses. Thus, it is limited to the commonly abused illegal drugs, but does not cover alcohol. This omission is significant in a Convention designed to address international social problems of children because alcohol is perhaps the most serious substance abuse

62. A productive beginning to this process might be the identification of some of the more egregious and widely practiced forms of exploitation of children currently in practice. See, e.g., J. Boyden & A. Hudson, *supra* note 61. The result would be a far more detailed and specifically prohibitory article than the current version. European Social Charter, *supra* note 61, art. 7, provides an example of a treaty provision against economic exploitation of children that is somewhat more in line with the approach I suggest:

With a view to ensuring the effective exercise of the right of children and young persons to protection, the Contracting Parties undertake:

- (1) to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education;
- (2) to provide that a higher minimum age of admission to employment shall be fixed with respect to prescribed occupations regarded as dangerous or unhealthy;
- (3) to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education;
- (4) to provide that the working hours of persons under 16 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training;
- (5) to recognize the right of young workers and apprentices to a fair wage or other appropriate allowances;
- (6) to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day;
- (7) to provide that employed persons of under 18 years of age shall be entitled to not less than three weeks' annual holiday with pay;
- (8) to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations;
- (9) to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control;
- (10) to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.

Id.

63. Draft Convention, *supra* note 1, art. 18 bis. Presumably these treaties include the Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 U.N.T.S. 204, and amending Protocol, Mar. 25, 1972, U.N. Doc. E/Conf. 63/9, U.K.T.S. 23 (1979); and the Convention on Psychotropic Substances, Feb. 21, 1971, U.N. Doc. E/Conf. 58/6, — U.S.T. —, T.I.A.S. No. 9725, *reprinted in* 10 I.L.M. 261.

problem facing children today.⁶⁴ If the Convention is to fully address the issue of substance abuse, it should cover alcohol use by children.

Article 19. *Rights of Children in Delinquency Procedures*: Article 19 provides for children accused of violating penal laws basic procedural safeguards,⁶⁵ such as notice of charges,⁶⁶ the presumption of innocence,⁶⁷ the right to counsel,⁶⁸ the right to a speedy and fair trial,⁶⁹ and the right of appellate review.⁷⁰ Each State Party must treat detained children with humanity and dignity,⁷¹ and must direct those found guilty toward social rehabilitation.⁷² The article forbids capital punishment and imprisonment without parole for criminals under eighteen years of age.⁷³ It also forbids arbitrary detention, torture, and cruel, inhuman or degrading treatment⁷⁴ of children but does not recognize that these abuses exist in numerous settings outside the delinquency context.⁷⁵ The drafters should elevate these prohibitions to one or more separate articles to establish that they apply generally, and not only in delinquency settings.⁷⁶

64. See Donovan & Jessor, *Adolescent Problem Drinking*, 39 J. STUD. ALCOHOL 1506 (1978); Rachal, Guess, Hubbard & Maisto, *Alcohol Misuse by Adolescents*, 6 ALCOHOL HEALTH RES. WORLD 61 (1982); Singer & Anglin, *The Identification of Adolescent Substance and Abuse by Health Care Professionals*, 21 INT'L J. ADDICTIONS 247 (1986).

65. Draft Convention, *supra* note 1, art. 19, para. 1.

66. *Id.* para. 2(c)(ii).

67. *Id.* para. 2(c)(i).

68. *Id.* para. 2(c)(ii).

69. *Id.* paras. 2(c)(iii), 4(a).

70. *Id.* para. 2(c)(iv). Noticeably absent are the following procedural safeguards mandated by the United States Constitution: right against self-incrimination and the right of confrontation and cross-examination, *In re Gault*, 387 U.S. 1 (1967); right to proof of guilt beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970); freedom from double jeopardy, *Breed v. Jones*, 421 U.S. 519 (1975); and the right against unreasonable searches and seizures, *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985). The most comprehensive international instrument on juvenile justice, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Nov. 29, 1985, — U.N. GAOR, U.N. Doc. GA/7272 (press release), at 410 (1986), is also less protective of juvenile's rights than the United States Constitution, but is more thorough than draft article 19 of the Convention. Draft Convention, *supra* note 1, art. 19. In addition to the rights protected under draft article 19, the Standard Minimum Rules protect the right against self-incrimination and the right to confront and cross-examine witnesses. See *id.* art. 7.

71. Draft Convention, *supra* note 1, art. 19, para. 4.

72. *Id.* para. 3.

73. *Id.* para. 2(b).

74. *Id.* para. 2(a).

75. An example already recognized in the Draft Convention itself is the educational setting. See *supra* note 53. Other examples are State-run or regulated child care and treatment facilities—particularly those for treatment of emotionally disturbed or retarded children.

76. The arbitrary detention, torture, and degrading treatment provisions of other international instruments consistently follow this suggested format. See, e.g., Universal Declaration of Human Rights, *supra* note 3, arts. 5, 9; International Covenant on Civil and Political Rights, *supra* note 3, arts. 7, 9; European Convention on Human Rights, *supra* note 53, arts. 3, 5; American Convention on Human Rights, *supra* note 31, arts. 5, 7.

Article 20. *Obligation of States Parties to Obey International Humanitarian Law Applicable to Children in Armed Conflict*: This article covers the dangers to children as victims of armed conflict, and as conscripted participants.⁷⁷ States Parties agree to follow international humanitarian law applicable to children, and to accept a specific prohibition against recruiting children under the age of fifteen into their armed forces.⁷⁸ Although the fifteen-year minimum age for induction is also the standard in existing international conventions on the subject,⁷⁹ it is too low. States are tempted to use children in the military because they need troops, and because children make good soldiers. Children are particularly susceptible to inducement to join armed forces and to exploitation once they join.⁸⁰ These practices are particularly harmful to children.⁸¹ Draft article 1 of the Convention properly defines children as persons under eighteen years of age. Draft article 20 should propose that those persons defined as children will not serve in armies. Unless the Convention adopts this position, the current fifteen-year age standard embodied in the 1977 Geneva Protocol will not only remain, but be fortified.

Article 21. *Non-preemption Provision*: This article provides that the Convention will not preempt provisions in domestic or international law that are "more conducive to realization of the rights of the child" than provisions of the Convention.⁸²

77. See J. BOYDEN & A. HUDSON, *supra* note 61, at 5-6. In addition to historical deprivations to children as part of abused civilian populations in time of war, the use of children as combatants continues to be widespread. Recently, they have fought as soldiers in Ulster, Beirut, Kampuchea, Iran, and Nicaragua.

Children and young people have been indoctrinated, used to deliver messages to war zones and undertake intelligence work, enlisted as combatants and arrested and tortured to death in conflicts throughout the world. At least 45 children have been sentenced to death and executed or tortured to death in Iran and it is alleged that an unknown number of children have also been used as mine detectors Children are agile, can develop a strong commitment to a cause and have a keen sense of loyalty. They are valuable witnesses and can provide vital military information, whether knowingly or unwittingly, voluntarily or under torture.

Id.; see also A. FREUD & D. BURLINGHAM, *WAR AND CHILDREN* (1943) (documents effects of war upon children); R. ROSENBLATT, *CHILDREN OF WAR* (1983) (treats the effects of war upon children in Belfast, Israel, Palestine, Cambodia, and Vietnam).

78. Draft Convention, *supra* note 1, art. 20, para. 2.

79. 1977 Geneva Protocol I Additional to the Geneva Conventions of August 12, 1949, Dec. 12, 1977, 1977 U.N. JURID. Y.B. 95 U.N. Doc. No. A/32/144. The 1977 General Protocol also prohibits Parties from inducting children under fifteen years of age into armed services and, as in the Draft Convention, requires parties to "take all feasible measures" to prevent children from taking part in hostilities. *Id.*

80. See J. BOYDEN & A. HUDSON, *supra* note 61, at 5-6.

81. *Id.* at 7.

82. Draft Convention, *supra* note 1, art. 21.

III. THE DEVELOPMENT OF CHILDREN'S RIGHTS IN COMPARATIVE HISTORICAL CONTEXT

Children's rights are a relatively new and emerging concept.⁸³ The child did not attain a juridical personality until the nineteenth century, some two to three hundred years after adult males.⁸⁴ Until that point, European children were legally little more than chattels of their fathers and were virtually unprotected by the State.⁸⁵

Nineteenth century reform movements reduced the unqualified power of fathers over children,⁸⁶ and by the end of that century, the State had assumed a more active role as protector of the child against the power of parents and economic exploitation.⁸⁷ However, children were still not accorded the fundamental human rights that Western legal codes and constitutions bestowed upon adults.

In the United States, for example, the concept that children might have rights against the State did not begin to emerge until one-hundred and fifty years after ratification of the Bill of Rights.⁸⁸ It was another thirty years before the Supreme Court assigned a fundamental constitutional right to children in *Brown v. Board of Education*,⁸⁹ and

83. See generally THE HISTORY OF CHILDHOOD (L. de Mause ed. 1974); L. POLLOCK, FORGOTTEN CHILDREN (1983); Weisberg, *The Concept of the Rights of the Child*, 21 REV. INT'L COMM'N JURISTS 43 (1978).

84. Weisberg, *supra* note 83, at 46; see also J. BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 883 (1912); L. MACKENZIE, STUDIES IN ROMAN LAW 70-71 (1911). The concept of juridical personality for individuals is prominent in international human rights instruments and in the jurisprudence of European and Latin American Countries. See, e.g., Universal Declaration of Human Rights, *supra* note 3, art. 6; International Covenant on Civil and Political Rights, *supra* note 3, art. 16. The concept is a good measure of comparative legal status, as possession of a legal personality provides the basis for the enjoyment of legal rights and standing to engage in legal transactions. Because of their dependent status, it is predictable, however, that children will never enjoy legal personality equal to adults.

85. Weisberg, *supra* note 83, at 45. As Weisberg notes, prior to nineteenth century reforms, "children could be sold, abandoned, abused and mutilated with impunity." *Id.*; see also B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 65-69 (1962) and de Mause, *The Evolution of Childhood*, in THE HISTORY OF CHILDHOOD, *supra* note 83, at 25-38.

86. Weisberg, *supra* note 83, at 46-47.

87. *Id.*

88. Children's rights against the State emerged indirectly. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the United States Supreme Court established the rights of parents *vis-a-vis* the State to control their children and obtain foreign language instruction for their children in the public schools. Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the right was reaffirmed for Oregon parents who wished to educate their children outside the public schools. In neither of these cases, however, did the court speak of the rights of children.

89. 347 U.S. 483 (1954). See also *Plyler v. Doe*, 457 U.S. 202 (1982). It is often overlooked in *Brown* that the plaintiffs were children. In addressing the racial issue, the Court and the litigants either overlooked the significance of this point or saw it as inconsequential. Clearly the opinion ascribes to children the right to equal protection of the laws:

We can come then to the questions presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal education opportunities? We believe that it does. . . .

it was less than twenty years ago that children's rights to basic due process began to expand to resemble the rights of adults.⁹⁰ A representative sampling of other countries reveals a roughly similar pattern, with significant expansion of children's rights occurring in the last twenty to forty years.⁹¹

International Conventions began to indirectly protect children's rights in the late nineteenth and early twentieth centuries.⁹² The first significant international instrument devoted primarily to children's rights was the Declaration of Geneva, adopted by the League of

... [S]eparate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Brown, 347 U.S. at 493, 495.

90. The Supreme Court's decision in *In re Gault*, 387 U.S. 1 (1967), extended to children in delinquency cases the procedural due process rights of notice, counsel, confrontation and cross examination, and the privilege against self-incrimination. Since the decision in *Gault*, children have been found to have the right to freedom of speech, *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); the right to proof of guilt beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970); freedom from double jeopardy in delinquency cases, *Breed v. Jones*, 421 U.S. 519 (1975); the right to procedural due process (including notice and right to hearing) in school discipline cases where suspension is threatened, *Goss v. Lopez*, 419 U.S. 565 (1975); the "liberty interest" in not being confined unnecessarily for medical treatment, *Parham v. J.R.*, 442 U.S. 584 (1979); the right to privacy, including the right to abortion, *Bellotti v. Baird*, 443 U.S. 622 (1979), *reh'g denied*, 444 U.S. 882 (1979), and access to contraceptives, *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); the right to access to information under the First Amendment to the United States Constitution, *Board of Education v. Pico*, 457 U.S. 853 (1982); and the right against unreasonable searches and seizures, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Even with this late but now rapid expansion of children's constitutional rights in the United States, their rights are not coterminous with those of adults. For example, the Supreme Court has specifically denied children the right to jury trial in delinquency cases. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

91. See Bratholm & Matheson, *The Rights of the Child in Norway*, 13 COLUM. HUM. RTS. L. REV. 537 (1981); De Duran, *Child Legislation in Colombia*, 13 COLUM. HUM. RTS. L. REV. 101, 104-06 (1981); Freeman, *The Rights of the Child in England*, 13 COLUM. HUM. RTS. L. REV. 601 (1981); Havelka & Raduanova, *Czechoslovak Law and the Status of the Child*, 13 COLUM. HUM. RTS. L. REV. 263, (1981); Sheng, Wang, & Wu, *Chinese Law and Status of Children*, 13 COLUM. HUM. RTS. L. REV. 71, 72 (1981); Youth Law Center, *Legal Rights of Children in the United States of America*, 13 COLUM. HUM. RTS. L. REV. 675, 675-82 (1981).

For an excellent review of the rights of children in the countries listed above, as well as in Australia, People's Republic of the Congo, Cuba, Egypt, Greece, Israel, and Kenya, see 13 COLUM. HUM. RTS. L. REV. 1 (1981); see also Eekelaar, *Parents and Children—Rights, Responsibilities and Needs: An English Perspective*, 2 HUM. RTS. ANN. 81 (1984).

92. Children's rights began as a subcategory in the development of the rules of war and in international labor conventions. By 1907, the Hague Conventions had restricted the choice of tactics and weapons, and in that sense protected children as well as adults. See Convention Respecting the Laws and Customs of War on Land (Hague Convention No. IV), October 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631. Geneva Convention IV and Additional Protocol I incorporated and expanded many of the principles contained in the Hague Conventions and specifically provided for the protection of children; see also Convention Relative to the Protection of Civilian Persons in Time of War (Geneva No. IV), August 12, 1949, art. 24, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; 1977 Geneva Protocol I, *supra* note 79.

Nations in 1924.⁹³ Although the Declaration spoke in elegant tones of the duties of nations toward children, it was substantively unfocused and essentially an aspirational document.⁹⁴

As part of the increased interest in human rights after the Second World War, the international community began to recognize the human rights of children. Children's rights are specifically mentioned in two articles in the Universal Declaration of Human Rights,⁹⁵ in four articles of the International Covenant on Civil and Political Rights,⁹⁶ and in three articles of the International Covenant on Economic, Social, and Cultural Rights.⁹⁷ More significantly, in 1952, the United Nations adopted the Declaration of the Rights of the Child,⁹⁸ the first and only document to date that purports to contain a comprehensive statement of children's rights. This is conceptually the parent document to the Convention now being drafted. Although the Declaration of the Rights of the Child is more comprehensive and directed than its predecessor, the Geneva Declaration, it cannot be termed a "comprehensive" document on children's rights. Nevertheless, it represents the centerpiece in the current landscape of international children's rights and the reference point for the Convention drafters.

93. LEAGUE OF NATIONS O.J. Spec. Supp. 21 (1924).

94. The text of the Declaration of Geneva, is as follows:

Declaration of Geneva

"By the present Declaration of the Rights of the Child, commonly known as the Declaration of Geneva, men and women of all nations, recognising that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

"I. The child must be given the means requisite for its normal development, both materially and spiritually;

"II. The child that is hungry must be fed; the child that is sick must be helped; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured;

"III. The child must be the first to receive relief in times of distress;

"IV. The child must be put in a position to earn a livelihood and must be protected against every form of exploitation;

"V. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men."

Id. at 43.

95. Universal Declaration of Human Rights, *supra* note 3, arts. 25 (special protection for childhood), 26 (right to education). It is arguable that many of the rights contained in the Covenant on Civil and Political Rights, and in the International Covenant on Economic, Social and Cultural Rights, apply to children as well, though they do not mention children specifically. See *infra* notes 168-79 and accompanying text.

96. See International Covenant on Civil and Political Rights, *supra* note 3, arts. 6 (barring death penalty for crimes committed by minors), 14 (judicial procedure for juveniles), 23 (protection for children at dissolution of marriage), 24 (special protection for children and rights to a name and nationality).

97. International Covenant on Economic, Social and Cultural Rights, *supra* note 12, arts. 10 (protection of family and children), 12 (right to health care), 13 (right to education).

98. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354, (1959) [The text of the Declaration of the Rights of the Child appears in Appendix I *infra*].

This Article now examines where the Convention fits into the existing international instruments related to children's rights, particularly in relation to the Declaration of the Rights of the Child, and analyzes whether all or parts of the Convention are necessary.

IV. CURRENT STATUS OF INTERNATIONAL CHILDREN'S RIGHTS AND THE ISSUE OF THE NEED FOR A CONVENTION

A. CURRENT STATUS OF CHILDREN'S RIGHTS IN INTERNATIONAL INSTRUMENTS

Three general categories of multilateral international instruments currently promote and protect children's rights.⁹⁹ First, there are instruments devoted solely to the general subject of children's rights. The Declaration of the Rights of the Child¹⁰⁰ is the only international instrument currently in this category, with the Convention itself in line to assume the primary position. Second, there are treaties dealing with specific subject areas, such as labor, war, or education, and the effects of those areas upon specific interests of children. Third, there are general, international, human rights instruments, including regional instruments such as The European Convention on Human Rights¹⁰¹ and the American Convention on Human Rights.¹⁰²

1. *The United Nations Declaration of the Rights of the Child*

The Declaration of the Rights of the Child (the "Declaration") announces general "principles" for the care and protection of children. Several characteristics of this instrument's approach to promoting children's interests make it a dangerous precedent for drafters of the emerging Convention. First, the Declaration is devoted almost entirely to economic, social, and cultural interests as opposed to civil and political rights. The Declaration does not mention the word "right" except in the title, Preamble, and non-discrimination clause.¹⁰³

99. In addition to the numerous instruments cited in the discussion to follow, there are other international instruments that deal with children's rights and interests; however, because of their non-binding nature or relatively small number of adherents, they will not be discussed here in detail. Chief among these instruments are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, *supra* note 70; Standard Minimum Rules for the Treatment of Prisoners, July 31, 1957, E.S.C. Res. 663 (XXIV) C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957). Together these two documents cover arrest, trial, detention, and treatment of juvenile offenders. For an excellent compendium of international instruments on children's rights, see INTERIGHTS (The International Centre for the Legal Protection of Human Rights), FAMILY, MARRIAGE AND CHILDREN: SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS (1986).

100. Declaration of the Rights of the Child, *supra* note 98.

101. European Convention on Human Rights, *supra* note 53.

102. American Convention on Human Rights, *supra* note 31.

103. See Declaration of the Rights of the Child, *supra* note 98, principle 1.

The stated "principles" focus upon child care and child treatment policy, educational entitlements, family security, health, and economic subsistence. The closest the Declaration comes to announcing a civil or political right is to declare "entitlement" to a nationality¹⁰⁴ and "entitlement" to protection from social and religious discrimination.¹⁰⁵ It is silent on such rights as those to life and liberty, freedom from torture, freedom from arbitrary arrest and detention, due process of law, privacy and freedom of speech, thought and religion, all of which appear prominently in the Universal Declaration of Human Rights.¹⁰⁶

Second, the Declaration is essentially aspirational and precatory. In contrast to the Universal Declaration of Human Rights, which speaks specifically of "rights" and "freedoms," the Declaration speaks of "principles" and "entitlements." For example, principle 2 states:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount considerations.¹⁰⁷

Clearly, this language is not designed to help measure compliance or secure enforcement.

The focus on economic, social and cultural rights, and the use of aspirational and imprecise language carry over into the emerging Convention with detrimental effect. The Convention fails to sufficiently clarify its apparently disparate emphasis between civil/political and economic/social rights. The Convention's pronouncements of rights and interests are also frequently weak and unclear. This uncertainty is particularly detrimental where, as in the case of civil and political rights, strength and clarity of language are not only possible but essential.

Finally, the Declaration of the Rights of the Child treats the interests of children essentially as unconnected to, and independent of, rights and interests of parents and issues of family control and unity.¹⁰⁸ This is perhaps not a serious omission in a document with the Declaration's limited purpose but, as I shall demonstrate later in this Article, a similar constricted focus in the emerging Convention causes serious problems with unresolved conflicts between various

104. *Id.* principle 3.

105. *Id.* principle 10.

106. See Universal Declaration of Human Rights, *supra* note 31, arts. 3, 5, 9, 10-12, 18, 19.

107. Declaration of the Rights of the Child, *supra* note 98, principle 2.

108. The single exception to this characteristic is found in principle 7 that designates the parents as primarily responsible for the child's education and guidance. Declaration of the Rights of the Child, *supra* note 98, principle 7.

competing rights and interests.¹⁰⁹ A recognition of these potential conflicts in the Declaration might have prevented the failure to deal with them in the Convention.

2. *Multilateral Instruments Dealing in Part with Children's Rights*

The second category of multilateral instruments dealing with children's rights and interests are treaties, recommendations, and declarations in subject areas that contain specific provisions protecting children.

International Labour Organization Instruments: The International Labour Organization (the "I.L.O.") instruments specifically relevant to children address the subjects of age for employment,¹¹⁰ working hours and conditions for children,¹¹¹ protection of children from dangerous work and substances,¹¹² work training and appren-

109. See *infra* notes 229-31 and accompanying text.

110. Minimum Age (Industry) Convention, 1919 (I.L.O. Convention No. 5), *revised*, 1937 (No. 59); Minimum Age (Sea) Convention, 1920 (I.L.O. Convention No. 7), *revised*, 1936 (No. 58); Minimum Age (Agriculture) Convention, 1921 (I.L.O. Convention No. 10); Minimum Age (Trimmers and Stokers) Convention, 1921 (I.L.O. Convention No. 15); Minimum Age (Non-Industrial Employment) Convention, 1932 (I.L.O. Convention No. 33), *revised*, 1937 (No. 60); Minimum Age (Fishermen) Convention, 1959 (I.L.O. Convention No. 112); Minimum Age (Underground Work) Convention, 1965 (I.L.O. Convention No. 123); Minimum Age for Admission to Employment Convention, June 23, 1973 (I.L.O. Convention No. 138), 1015 U.N.T.S. 297 (this Convention states in its preamble that it is intended to "gradually replace the existing [I.L.O. Conventions] applicable to limited economic sectors, with a view to achieving the total abolition of child labour" Thus, as this treaty gains acceptance, the preceding I.L.O. minimum age treaties and the following Recommendations will become obsolete); Minimum Age (Non-Industrial Employment) Recommendation, 1932 (I.L.O. Recommendation No. 41); Minimum Age (Family Undertakings) Recommendation, 1937 (I.L.O. Recommendation No. 52); Minimum Age (Coal Mines) Recommendation, 1953 (I.L.O. Recommendation No. 96); Minimum Age (Underground Work) Recommendation, 1965 (I.L.O. Recommendation No. 124).

111. Night Work of Young Persons (Industry) Convention, 1919 (I.L.O. Convention No. 6), *revised*, 1948 (No. 90); Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946 (I.L.O. Convention No. 79); Night Work of Children and Young Persons (Agriculture) Recommendation, 1921 (I.L.O. Recommendation No. 14); Night Work of Young Persons (Non-Industrial Occupations) Recommendation, 1946 (I.L.O. Recommendation No. 80); Conditions of Employment of Young Persons (Underground Work) Recommendation, 1965 (I.L.O. Recommendation No. 125).

Other I.L.O. Conventions regulate work conditions of all workers, including children. See, e.g., Wages and Hours of Work and Manning (Sea) Convention, 1946 (I.L.O. Convention No. 76); Convention Concerning the Maximum Permissible Weight to be Carried by One Worker, June 28, 1967 (I.L.O. Convention No. 127), 721 U.N.T.S. 39.

112. Medical Examination of Young Persons (Industry) Convention, 1946 (I.L.O. Convention No. 77); Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (I.L.O. Convention No. 78); Medical Examination of Young Persons (Underground Work) Convention, 1965 (I.L.O. Convention No. 124); Medical Examination of Young Persons Recommendation, 1946 (I.L.O. Recommendation No. 79).

In addition, numerous I.L.O. conventions and recommendations set health protection standards for workers of all ages. See, e.g., Radiation Protection Convention, 1960 (I.L.O. Convention No. 115); Convention Concerning Protection Against Hazards of Poisoning Arising From Benzene, June 23, 1971 (I.L.O. Convention No. 136), 885 U.N.T.S. 45.

ticeship,¹¹³ and youth employment.¹¹⁴ In addition, the Forced Labour Convention of 1930¹¹⁵ and the Abolition of Forced Labour Convention of 1957,¹¹⁶ require States Parties to suppress and abolish forced child labor imposed by either the State or by private individuals and organizations.

The still expanding body of I.L.O. conventions and recommendations affords considerably more protection than article 18, the work and exploitation article of the Draft Convention.¹¹⁷ As noted previously, article 18 sets no standards and refers in cursory fashion to the child's need for protection from exploitation, hazardous work, and work that interferes with education,¹¹⁸ and discusses the need to regulate minimum age, hours, and conditions of employment.¹¹⁹

Although existing I.L.O. conventions address some of the issues of child labor in piecemeal fashion, there is yet needed a comprehensive, multilateral treaty on the subject of economic exploitation of children. That need will not be met by article 18 of the Convention.

Treaties on Traffic in Children and Slavery: The International Convention for the Suppression of Traffic in Women and Children¹²⁰ and the 1947 Protocol¹²¹ define the international offense of trafficking in children and require States Parties to extradite and punish offenders. The Slavery Convention¹²² and amending Protocol¹²³ forbid enslavement of "persons" in general, and require States Parties to take

113. Social Policy (Basic Aims and Standards) Convention, 1962 (I.L.O. Convention No. 117), art. 15; Vocational Training Recommendation, 1939 (I.L.O. Recommendation No. 57); Apprenticeship Recommendation, 1939 (I.L.O. Recommendation No. 60); Vocational Training (Seafarers) Recommendation, 1946 (I.L.O. Recommendation No. 77); Vocational Guidance Recommendation, 1949 (I.L.O. Recommendation No. 87); Vocational Training Recommendation, 1962 (I.L.O. Recommendation No. 117); Vocational Training (Fishermen) Recommendation, 1966 (I.L.O. Recommendation No. 126).

114. Unemployment (Young Persons) Recommendation, 1936 (I.L.O. Recommendation No. 45).

115. Forced Labour Convention, 1930 (I.L.O. Convention No. 29).

116. Forced Labour Convention, 1957 (I.L.O. Convention No. 105).

117. Draft Convention, *supra* note 1, art. 18.

118. *Id.* para. 1.

119. *Id.* para. 2; *cf.* article 2 of the Minimum Age for Admission to Employment Convention (I.L.O. No. 138), *supra* note 110, (abolishes child labor altogether for children under fifteen years of age and severely restricts it for children under eighteen); article 15 of the Social Policy (Basic Aims and Standards) Convention (I.L.O. No. 117), *supra* note 113, (forbids employment of children interfering with education). Numerous I.L.O. conventions protect children from health hazards at work, and regulate hours and conditions of work. See *supra* notes 111-12.

120. International Convention for the Suppression of Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 416. This treaty incorporates by reference essential definitions of trafficking offenses contained in the International Agreement for the Suppression of the "White Slave Traffic," Mar. 18, 1904, 1 L.N.T.S. 84.

121. Nov. 12, 1947, 53 U.N.T.S. 13.

122. Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253.

123. Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, T.I.A.S. No. 3532, 182 U.N.T.S. 51.

measures to prevent and abolish slavery and "conditions analogous to slavery," including, under some conditions, forced labor.¹²⁴

A supplementary convention on slavery and the slave trade¹²⁵ reinforces these treaties, and the 1930 I.L.O. convention on forced labor¹²⁶ requires states to deal specifically with inducement or delivery of children into slavery or exploitive labor. Finally, a 1950 United Nations treaty prohibits sexual exploitation and victimization of children.¹²⁷ The Draft Convention as it currently stands fails to address the enslavement, trafficking, and sexual exploitation of children.

Treaties on Refugees and Stateless Persons: The Convention Relating to the Status of Refugees and its accompanying Protocol apply to children.¹²⁸ The Convention on the Reduction of Statelessness¹²⁹ attempts to provide an international basis for attaining nationality. The Convention Relating to the Status of Stateless Persons¹³⁰ establishes obligations of States Parties to stateless persons. The latter two treaties also apply to children. For example, the Convention Relating to the Status of Stateless Persons includes provisions on public education¹³¹ and employment¹³² that are aimed directly at children. The Draft Convention contains no provisions dealing specifically with stateless children, except the child's right to nationality in article 2.¹³³

Treaties on the Rules of War: The 1949 Geneva Convention No. IV¹³⁴ and the additional 1977 Geneva Protocol I¹³⁵ protect children during wartime. These documents require that during periods of conflict, States Parties must, *inter alia*, protect children from hostilities,¹³⁶

124. Slavery Convention, *supra* note 122, art. 5, at 265.

125. Supplementary Convention on the Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3.

126. *See supra* note 116.

127. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271. The treaty does not specifically refer to children in its prohibitory articles, but its preamble recognizes previous conventions on traffic in women and children and extends protection in general to "injured persons." *Id.* art. 5. It is reasonable to interpret this treaty to cover children.

128. *See supra* notes 33-34 and accompanying text.

129. Convention on the Reduction of Statelessness, Aug. 31, 1961, 989 U.N.T.S. 175. The relatively low number of ratifications of this treaty reflects the notorious reluctance of states to relinquish sovereignty over conditions of nationality—the primary obstacle to any effective solution to the problem of statelessness. Article 2 of the Draft Convention also attempts to establish an international standard for attaining nationality. Draft Convention, *supra* note 1, art. 2; *see also supra* note 3. Although commendable in purpose, article 2 of the Draft Convention will probably be no better received.

130. Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 130.

131. *Id.* art. 22.

132. *Id.* art. 24, para. 1(a).

133. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 92.

134. Draft Convention, *supra* note 1, art. 2, para. 1.

135. 1977 Geneva Protocol, *supra* note 79.

136. *Id.* art. 51.

keep them united with parents and guardians,¹³⁷ care for separated and orphaned children,¹³⁸ and properly clothe and feed them.¹³⁹ If detained, children must be interned with their parents. Minors detained for war crimes or security purposes may not be incarcerated with adults and may not be executed for crimes committed prior to their eighteenth birthday.¹⁴⁰

As noted previously, both the 1977 Additional Protocol to the 1949 Geneva Convention and the Draft Convention prohibit induction of children under fifteen into the armed services or employment of them as combatants.¹⁴¹ The Protection of children under Geneva Convention IV and the 1977 Additional Protocol is more specific than that of the Convention in the area of Rules of War and humanitarian law. The Convention essentially attempts to incorporate the appropriate provisions of the Geneva treaties, and, as a result, its coverage is far more general.

Conventions on Education: In addition to the I.L.O. conventions and recommendations on education, apprenticeship, and vocational training,¹⁴² the Convention Against Discrimination in Education¹⁴³ deals exclusively with educational rights. Its purpose is to eliminate discrimination in public education on the basis of race, sex, religion, and other suspect grounds. In content, the treaty is very broad and amounts, in effect, to a comprehensive treaty setting international standards, goals and policy for public education. In particular, the treaty stresses free and compulsory primary education and equal access and opportunity to all levels of education.

Articles 15 and 16 of the Convention attempt to set similar standards,¹⁴⁴ but are less detailed and add nothing substantively to the Convention Against Discrimination in Education.

Conventions on Child Custody, Child Abduction, Child Support, Illegitimacy and Adoption: Two relatively new treaties deal with inter-

137. *Id.* art. 74.

138. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 92, art. 24.

139. 1977 Geneva Protocol, *supra* note 79, art. 69.

140. *Id.* art. 75, para. 5.

141. *Id.* art. 77; *see also supra* notes 78-79 and accompanying text.

142. *See supra* note 114.

143. Convention Against Discrimination in Education, *supra* note 50. The 1962 Protocol amending the Convention established a dispute resolution procedure for alleged violations. 1962 Protocol Against Discrimination in Education, Dec. 10, 1962, 651 U.N.T.S. 362. Other multilateral, international instruments recognize a right to education and announce international goals for education. *See, e.g.,* Universal Declaration of Human Rights, *supra* note 31, art. 26; International Covenant on Economic, Social and Cultural Rights, *supra* note 12, art. 13; European Convention on Human Rights, First Protocol, March 20, 1952, art. 13, 213 U.N.T.S. 262; American Declaration of the Rights and Duties of Man, *supra* note 31, art. XII.

144. Draft Convention, *supra* note 1, arts. 15, 16.

national child custody problems, particularly child abduction. A European convention on recognition and enforcement of foreign custody decrees mandates mutual enforcement of valid custody decrees of States Parties, and establishes machinery for cooperation in locating children and returning them to the country of dominant, legal authority.¹⁴⁵ A second convention, also predominantly European, is similar, except it provides that if the country seeking return of a child follows certain procedures, it does not need a valid custody order.¹⁴⁶

Article 6 ter of the Draft Convention contemplates similar policies requiring States Parties to "promote the conclusion" of international agreements to "combat the illicit transfer and non-return of children from abroad."¹⁴⁷ On this very important and legally complex subject the drafters of the Convention correctly limited their work to endorsement of pertinent, extant treaties and the promotion of new ones rather than attempting to deal with the subject in depth in the Convention.

The Hague Conference and the Council of Europe have also sponsored adoption of other treaties requiring international recognition of state laws and judicial rulings protecting children. These are relatively new, regionally concentrated treaties in the areas of child support, adoption, and protection of children's legal and property interests as defined under law of the state of nationality.¹⁴⁸ Except for intercountry adoption addressed in article 11, the Draft Convention does not cover these subjects.

The Council of Europe has sponsored the only existing multilateral treaty on protection of children born out of wedlock.¹⁴⁹ The Draft Convention deals with the subject only in general terms in article 4.¹⁵⁰ Treaties concerning adoption, custody, and child support are

145. European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, May 20, 1980, Europ. T.S. No. 105, *reprinted in* 19 I.L.M. 273.

146. Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, 19 I.L.M. 1501, 1502.

147. Draft Convention, *supra* note 1, art. 6 ter, paras. 1,2.

148. See, e.g., Convention on the Law Applicable to Maintenance Obligations, Oct. 2, 1973, Recognition R.T.A.F. 70; Convention of the and Enforcement of Decisions Relating to Maintenance Obligations, Oct. 2, 1973, 1980 Gr. Brit. T.S. No. 49 (Cmd. 7939); Convention on the Law Applicable to Obligations to Support Minor Children, Oct. 24, 1956, 510 U.N.T.S. 161; Convention on the Recovery Abroad of Maintenance, June 30, 1956, 268 U.N.T.S. 3; European Convention on the Adoption of Children, Apr. 24, 1967, 634 U.N.T.S. 51; Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, Oct. 5, 1961, 658 U.N.T.S. 143.

149. European Convention on the Legal Status of Children Born Out of Wedlock, Oct. 15, 1975, Europ. T.S. No. 85. In its last session in 1980, the Working Group on the U.N. Convention on the Rights of the Child considered, but did not agree on, a proposed article on the rights of children born out of wedlock. See 42 U.N. ESCOR (—th mtg.) at 4-5, U.N. Doc. E/CN.4/1986/39 (1986).

150. Draft Convention, *supra* note 1, art. 4.

vital to international children's rights, and should not be limited to Europe. The Draft Convention should endorse treaties currently in place and recognize the need for a more comprehensive international system of cooperation and mutual enforcement in these vital areas.

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages: This treaty¹⁵¹ forbids forced marriages or marriages arranged without consent of the parties, and it requires States Parties to establish and enforce a minimum age for marriage. The Draft Convention contains no comparable provision on either point.

Treaties Not Specifically Directed at Children but Affecting Them: The Convention on the Elimination of All Forms of Discrimination Against Women¹⁵² emphasizes the pre-eminence of children's interests in State action affecting families and promotes the establishment of childcare facilities. Most important, it promotes educational instruction designed to eliminate sexual stereotypes and to establish equal educational and sports opportunities.

The Genocide Convention¹⁵³ defines the crime of genocide as, *inter alia*, "forcibly transferring children of [one national, ethnic, racial or religious] group to another group."¹⁵⁴

The Convention Against Torture¹⁵⁵ contains no specific reference to children but, like its predecessor, the United Nations Declaration on Torture,¹⁵⁶ protects "all members of the human family,"¹⁵⁷ including children, from torture.

The International Convention on the Elimination of All Forms of Racial Discrimination,¹⁵⁸ like the torture convention, does not specifically refer to children. However, its preamble invokes the principle that "all human beings are born free and equal."¹⁵⁹ The language of

151. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, Nov. 7, 1962, 521 U.N.T.S. 231.

152. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979).

153. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 2.

154. *Id.* art. II(e).

155. Convention Against Torture, *supra* note 2.

156. Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975).

157. *Id.*

158. Convention on the Elimination of all Forms of Racial Discrimination, *supra* note 14. There are 120 parties to the Race Discrimination treaty. The International Convention on the Suppression and Punishment of the Crime of *Apartheid*, Nov. 30, 1973, 1973 U.N. JURID. Y.B. 70, U.N. Doc. A/Res./3068 (XXVIII) (1973), also protects children from racial discrimination under apartheid, now most notoriously practiced in South Africa. Article II(c) prohibits denying the right to education to racial groups. *Id.* art. II(c).

159. *Id.* preamble.

the treaty clearly applies universally. Specifically, article 5(3)(v) of the Race Discrimination Convention requires States Parties to prohibit racial discrimination in education,¹⁶⁰ an area that obviously applies to children.

The non-binding Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief¹⁶¹ generally promotes religious freedom. Article 5 specifically protects the right of parents to direct the child's moral education in accordance with their religious beliefs, as long as it is in the child's best interests.¹⁶² It also protects the child's right to religious education free from State discrimination and interference. Thus, although the declaration protects the child's right to freedom of religion from state interference, the child's right is clearly subordinate to the right of the parents to guide the child in this area as long as that guidance does not injure the mental or physical well-being of the child.

This careful delineation of the metes and bounds of potentially conflicting interests and prerogatives contrasts with the confusion in the religious freedom article in the Draft Convention. Even though the declaration is non-binding, it provides a model that the Convention drafters should examine.¹⁶³

3. *Human Rights Treaties*

The great international human rights instruments affecting children include the Universal Declaration of Human Rights,¹⁶⁴ the two International Covenants on Human Rights¹⁶⁵ and the European¹⁶⁶ and American¹⁶⁷ human rights conventions. The central issue is whether these instruments, particularly the International Covenants, which together cover a wide panoply of civil, political, economic and social rights, apply in general to children. This issue has important implications for the drafting of the children's rights convention. If they apply, then children are already protected in the exercise of most internationally recognized human rights. Therefore, it is important to

160. *Id.* art. 5(3)(v).

161. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/Res./36/55 (1982).

162. *Id.* art. 5.

163. More will be said about the confusion in the Draft Convention, *supra* note 1, caused by the failure to resolve conflicting interests of child, parent, family and state. The religious freedom article is an excellent example of this failure. See *id.* art. 7 bis.

164. Universal Declaration of Human Rights, *supra* note 3.

165. International Covenant on Civil and Political Rights, *supra* note 3; International Covenant on Economic, Social and Cultural Rights, *supra* note 12.

166. European Convention on Human Rights, *supra* note 53.

167. American Convention on Human Rights, *supra* note 31.

establish to what degree the International Covenants apply to children.

Portions of the International Covenants, as well as the Universal Declaration of Human Rights, apply specifically to children.¹⁶⁸ However, other articles of general application do not specifically refer to children even though they encompass some of the most fundamental human rights, such as the right to life, freedom from torture and slavery and the basic civil rights of thought, speech, religion, and participation in the political process.

Analysis of the covenants themselves and relevant supporting material show that most of these rights, except for those obviously intended exclusively for adults, such as the rights to vote and hold public office, do apply to children. Under international law, treaties are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."¹⁶⁹ Subsequent practice of the parties in the application of the treaty may also be considered,¹⁷⁰ as well as preparatory work, in order to illuminate the meaning of the language and the intent of the parties to the treaty.¹⁷¹

The human rights covenants assign rights to "everyone,"¹⁷² "all persons,"¹⁷³ "all individuals,"¹⁷⁴ "every human being,"¹⁷⁵ and ensure

168. These provisions apply to children in the following areas: 1) education, International Covenant on Economic, Social, and Cultural Rights, *supra* note 12, art. 13; Universal Declaration of Human Rights, *supra* note 3, art. 26; 2) special care, protection and assistance, *id.* art. 25; International Covenant on Economic, Social, and Cultural Rights, *supra* note 12, art. 10; International Covenant on Civil and Political Rights, *supra* note 3, art. 23; 3) protection for illegitimate children, Universal Declaration of Human Rights, *supra* note 3, art. 25; International Covenant on Economic, Social, and Cultural Rights, *supra* note 12, art. 10; 4) health care and environment, *id.* art. 12; 5) economic and social exploitation and hardships of employment, *id.* art. 10; 6) nondiscrimination, International Covenant on Civil and Political Rights, *supra* note 3, art. 24; 7) right to a name and nationality, *id.*; 8) freedom from the death penalty, *id.* art. 6; 9) due process and rehabilitation in juvenile court proceedings and dispositions, *id.* art. 14.

169. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/11/27 at 287, reprinted in 8 I.L.M. 679 (1969); see also RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES (Rev.) (tent. draft No. 6) § 325, at 8, (April 12, 1985), and Comments and Reporters Notes thereto, at 98-108.

170. See RESTATEMENT, *supra* note 169, § 325(2); Vienna Convention, *supra* note 169, art. 31(3).

171. The Vienna Convention on the Law of Treaties permits use of preparatory work only to confirm interpretation of the ordinary meaning of the language in light of its object and purpose, or where interpretation according to article 31 leaves the meaning ambiguous or leads to an absurdity. Vienna Convention, *supra* note 169, art. 32. The approach of the American Restatement Tentative Draft is less restrictive in the use of the *travaux préparatoires*, but the difference is insignificant for purposes of the present inquiry.

172. International Covenant on Economic, Social and Cultural Rights, *supra* note 12, arts. 6-9, 11-13, 15; International Covenant on Civil and Political Rights, *supra* note 3, arts. 12, 14, 16-19, 22.

173. International Covenant on Civil and Political Rights, *supra* note 3, arts. 10, 14, 26.

174. *Id.* art. 2.

that "no one" will be denied rights.¹⁷⁶ Both covenants seek to guarantee that the rights they prescribe will be exercised without "distinction" or "discrimination" of any kind, such as, "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (emphasis supplied).¹⁷⁷ In addition, the purpose of both conventions is to broadly promote international human rights. Denial of the application of the most basic rights in the covenants to children would squarely refute this essential intent.

The *travaux préparatoires* of the Covenant on Civil and Political Rights also demonstrate that it applies to children. During the drafting of that covenant, the Commission on Human Rights discussed at length the wisdom of inserting an article dealing specifically with children's rights.¹⁷⁸ With the exception of Poland,¹⁷⁹ all delegations to the Human Rights Commission and the Third Committee who spoke on the subject concluded that children were already covered by the other articles of the covenant.

There is little useful case law applying the covenants to children, but we can learn by analogy from the relatively rich flow of case law applying corresponding articles of the European Convention on Human Rights.¹⁸⁰ In those instances, the European Court of Human

175. *Id.* art. 6.

176. *Id.* arts. 7, 8, 11, 15, 16.

177. *Id.* art. 2, para. 1; International Covenant on Economic, Social and Cultural Rights, *supra* note 12, art. 2, para. 2.

178. The primary objection to inclusion of an article relating especially to children was that it was unnecessary because children were covered by other articles of the Covenant. 19 U.N. ESCOR (7521 mtg.) at 3, U.N. Doc. E/CN.4/SR. 752 (1964) (U.S.); 19 U.N. ESCOR (Agenda Item 14) at 3, U.N. Doc. E/CN.4/850/Add. 3 (1963) (U.K.); 19 U.N. ESCOR (Agenda Item 14) at 1, U.N. Doc. E/CN.4/850/Add. 6 (1963) (Nigeria); 19 U.N. ESCOR (Agenda Item 14) at 1, U.N. Doc. E/CN.4/850/Add. 12 (1963) (Australia); 17 U.N. GAOR, C.3 (1177th mtg.) at 218, U.N. Doc. A/C.3/SR.1177 (1962) (Liberia); 19 U.N. ESCOR (Agenda Item 14) at 1, U.N. Doc. E/CN.4/850/Add. 11 (1963) (Federal Republic of Cameroon). In addition, countries who interpreted the general provisions of the Covenant on Civil and Political Rights, *supra* note 3, as applying to children include: 17 U.N. GAOR, C.3 (1172d mtg.) at 197, U.N. Doc. A/C.3/SR. 1172 (1962) (Chile); 17 U.N. GAOR, C.3 (1174th mtg.) at 205, U.N. Doc. A/C.3/SR. 1174 (1962) (Greece); 17 U.N. GAOR, C.3 (1174th mtg.) at 206, U.N. Doc. A/C.3/SR. 1174 (1962) (Brazil); 17 U.N. GAOR, C.3 (1174th mtg.) at 207, U.N. Doc. A/C.3/SR. 1174 (1962) (Ukrainian Soviet Socialist Republic); 17 U.N. GAOR, C.3(1177th mtg.) at 208, U.N. Doc. A/C.3/SR. 1177 (1962) (Yugoslavia); 19 U.N. GAOR (Agenda Item 14) at 2, U.N. Doc. E/CN.4/850/Add. 2 (1963) (Tanganyika). Other nations argued that to dedicate an article specifically to children might imply that children were not subjects of the articles as they were intended to be. 19 U.N. ESCOR (Agenda Item 14) at 2, U.N. Doc. E/CN.4/850/Add. 2 (1963) (France).

179. In the Third Committee session on this subject, the Polish delegate stated that some of the general articles of the covenant applied to children. 17 U.N. GAOR, C.3 (1179th mtg.) at 207, U.N. Doc. A/C.3/SR. 1174 (1962).

180. European Convention on Human Rights, *supra* note 53.

Rights has accorded to children the right of education,¹⁸¹ the right to privacy and non-interference with family life,¹⁸² freedom from humiliating and degrading treatment,¹⁸³ and, most importantly, the right to be free of discrimination in the application of the other rights enumerated in the European Convention.¹⁸⁴ In addition, the European Commission on Human Rights has strongly suggested that the prohibitions against slavery and involuntary servitude apply to children.¹⁸⁵ The case law shows that all rights phrased in terms of general application apply.

The language of the American Convention on Human Rights¹⁸⁶ indicates that it also applies to children. Article 1, paragraph 2 states, "For the purposes of this Convention, 'person' means every human being."¹⁸⁷ It is difficult to imagine a clearer statement of intent.

B. THE NECESSITY FOR A CHILDREN'S RIGHTS CONVENTION

The above survey of existing international instruments reveals that most of the provisions of the International Covenants, as well as the European and American Conventions on Human Rights, apply to children,¹⁸⁸ and afford them a broad range of rights. Further, numerous treaties devoted to specific areas of concern protect children's rights.¹⁸⁹ Many of these documents afford protection in substantially

181. Belgian Linguistics Cases, 1968 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 832; Case of Kjeldsen, Busk, Madsen and Pedersen, 1976 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 502.

182. Marckx Case, 1979 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 411.

183. Tyrer Case, 1978 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 654; see also Campbell & Cosens v. United Kingdom, 1982 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) ch. II at 3, (Feb. 25, 1982).

184. Belgian Linguistics Cases, 1968 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 832; Marckx Case, 1979 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 411.

185. W., X., Y. and Z. v. United Kingdom, 1968 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.) 562. British sailors challenged their commitments, made when they were minors, to extended service in the British Navy. Although the Commission dismissed their challenges, it implied that, had the right against involuntary servitude applied to the facts of the case, the minority status of the applicants would have made no difference.

186. American Convention on Human Rights, *supra* note 31.

187. *Id.* art. 1.

188. Professor Cynthia Price Cohen argues that the lack of clear statements in the covenants raises doubts that they apply to children. Cohen, *The Human Rights of Children*, 12 CAP. U.L. REV. 369, 376 (1983). The simple answer to this assertion is that words and phrases such as "everyone" and "all persons" mean what they say. Even for those who find this explanation unsatisfactory, however, the clear message of the *travaux préparatoires*, quoted in large part by Professor Cohen herself, should erase any doubt. *Id.* at 378-80. At least one other authority has concluded that the rights in the Covenant on Civil and Political Rights *do* apply to children. Volio, *Legal Personality, Privacy and the Family*, in THE INTERNATIONAL BILL OF RIGHTS 185, 205 (L. Henkin ed. 1981).

189. See *supra* notes 110-51 and accompanying text.

more detail than that afforded in corresponding articles of the Draft Convention.

The array of existing documents protecting children raises two issues: 1) whether a new instrument in this area is either necessary or advisable; and 2) whether a new instrument on children's rights should take the form of a convention or a less definitive instrument, such as a declaration, resolution, or model rules.¹⁹⁰

Although a convention may not be the best option, there are several factors that weigh in favor of a new initiative. First, although the current coverage of children's rights described in the preceding examination of existing instruments is wide-ranging, in some places where the coverage exists it is not as thorough.¹⁹¹ Second, the body of international instruments omits some children's rights, such as minimum standards for treatment of disabled and emotionally disturbed children, standards for alternative placement of all children, and mandatory measures for detection and reporting of incidents of neglect and abuse.¹⁹² Finally, as the preceding discussion illustrates, provisions protecting the international rights and needs of children are scattered and disorganized. The provisions appear in numerous, often unrelated instruments, and are frequently buried in treaties or declarations that do not clearly indicate its subject matter. This disorganiza-

190. Both of these issues have, of course, already been answered, and a convention is now in process. However, neither the General Assembly, the Commission on Human Rights, nor the Working Group appears to have considered any other alternatives. The current work on the Draft Convention began in 1978 with a proposal from Poland of a text for a children's rights convention. This proposal closely resembled the Declaration of the Rights of the Child, *supra* note 98. See Commission on Human Rights, U.N. ESCOR Supp. (No. 4) at 75, U.N. Doc. E/CN.4/1292 (1978). The Commission on Human Rights then requested the Secretary General to solicit comments on the Polish draft from the United Nations Member States and to submit a report. *Id.* at 122. The Secretary General's Report, U.N. ESCOR (1324th mtg.) at 1, U.N. Docs. E/CN.4/1324 (1978); U.N. ESCOR (1324th mtg.) at 1, E/CN.4/1324/Add. (1978), contained from numerous states comments generally favoring a convention. In response, the Commission established the Working Group to begin the drafting process. See U.N. ESCOR Supp. (No. 6) at 60, U.N. Doc. E/CN.4/1347 (1979). By the time of its second session in 1980, the Working Group had before it a second Polish draft submitted by Poland in the Fall of 1979 that began to function as the primary working document. Revised Polish Draft, *supra* note 1. The Working Group seems to have assumed that as the International Covenants on Human Rights followed the Universal Declaration of Human Rights, *supra* note 3, a children's rights convention was the natural culmination of the process begun with the Declaration of the Rights of the Child, *supra* note 98. There is a facile symmetry in this reasoning which inhibits examination of the basic issues of whether a convention is needed, and, if so, whether the time is ripe for a convention or whether a less formally binding document is preferable.

191. For example, the protection of children as refugees, *see supra* notes 33-36 and accompanying text; protection of children from exploitation, *see supra* notes 61-62 and accompanying text.

192. The Draft Convention attempts to address the subjects of placement and treatment. Draft Convention, *supra* note 1, arts. 8 bis, 10, 12. The Draft Convention does not yet specifically address the issues of reporting and detection of neglect and abuse.

tion makes use and development of children's rights difficult and hinders the establishment of international consensus and understanding.

The above conditions indicate a clear need for a document that in some fashion organizes and clarifies the children's rights that have already been announced. This document should also centralize the focus of children's rights and provide a basis beyond the current Declaration of the Rights of the Child for developing a consensus on some of the rights. These are logical and necessary steps to constructing a body of international children's rights centered in an authoritative document that recognizes and leaves intact already established rights. It does not necessarily follow, however, that these steps should be accomplished by a convention that parties are asked to adopt as established international law, though, ultimately, that is the most desirable goal.

V. THE IMPLICATIONS OF THE LATE DEVELOPMENT OF CHILDREN'S RIGHTS UPON INTERNATIONAL IMPLEMENTATION

The history of children's rights and their current status in the myriad international instruments surveyed above reveals that they are relatively new in relation to the rights of adults. Moreover, viewing children's rights as independent from and not necessarily derivative of the rights of adults is even newer. The only extant, international document that attempts to fully recognize children's rights is the 1959 Declaration of the Rights of the Child.¹⁹³ It does so, however, in a very limited and summary fashion.

The relatively late development of children's rights imports on the creation of a treaty or other international human rights instrument in two ways. First, because they are still emerging, the catalog of children's rights with general international recognition is far from complete. Therefore, the rights are, to a large degree, undefined, and their status, both domestically and internationally is precarious. For example, it was hardly predictable twenty years ago that in 1979 the United States Supreme Court would recognize a child's right to obtain an abortion, and certainly not an abortion without parental consent.¹⁹⁴ It is unpredictable today whether this right will ever gain international

193. Declaration of the Rights of the Child, *supra* note 98.

194. *Bellotti v. Baird*, 443 U.S. 622 (1979), *reh'g denied*, 444 U.S. 882 (1979). The results in *Bellotti* were unthinkable to one justice at the time the opinion was rendered: "Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision." *Id.* at 657 (White, J., dissenting).

recognition, or, indeed, whether it will survive much longer in the United States.

Similarly, in 1982, the United States Supreme Court recognized the right of school children to receive information and ideas.¹⁹⁵ The Working Group on the Convention has not included such a right. Draft article 9 recognizes the "important function of the mass media" and calls upon states to "ensure" the child's access to "information and material from a diversity of national and international sources."¹⁹⁶ It is unclear whether this equivocal statement is a "right." The provision reflects the current uncertainty of international norms regarding censorship of information accessible to children.

Is the right to information for children merely a right in its infancy, incubating in the United States and other "progressive" western democracies before incorporation into international law, or will it die altogether? This quandary exemplifies the uncertain status of many children's rights, and the difficulty inherent in attempts to codify them. One result of this problem is an attempt by treaty drafters to state the right in amorphous terms such as those appearing in the first paragraph of draft article 9.¹⁹⁷

A second implication of the relatively late emergence of children's rights is that many come into conflict with rights already in place. Children's rights issues often carry a "tripartite" aspect not present in the rights of adults. For example, in *Bellotti v. Baird*,¹⁹⁸ a pregnant minor's right to an abortion without notice to parents conflicted with both the government's power to regulate, and the rights of the parents to control the welfare of the child.¹⁹⁹

Examples of the tripartite nature of children's rights issues and the difficulty it causes to rule-makers appear frequently in the Draft Convention. A few of the more prominent examples are article 6 (child's versus parent's right to choose the place of residence for the child),²⁰⁰ article 7 (child's right to freedom of thought, conscience and

195. *Board of Education v. Pico*, 457 U.S. 853 (1982).

196. Draft Convention, *supra* note 1, art. 9.

197. *Id.*

198. 443 U.S. 622 (1979).

199. See *supra* note 90. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the rights of the parents to control of the child were delineated against encroachment by the State. In *Bellotti* the situation was more complex. There the State was to say whether the child's right to abortion would prevail over the parents' rights to control the child. The interests of the parents were generally the same in both cases—control of the child. In *Meyer* they were pitted solely against the State (with the child's right, if it existed, subsumed in those of the parents) and in *Bellotti*, against the rights of the child with the state as ultimate enforcer of one against the other. A treatment of children's rights, parental rights and interests, and State authority as they interrelate in United States Supreme Court cases is found in *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1350-94 (1980).

200. Draft Convention, *supra* note 1, art. 6.

religion versus parents' right to guidance and control),²⁰¹ and article 14 (child's right to adequate standard of living imposing corresponding duties on parents and the state).²⁰²

Children's rights are also potentially self-conflicting because of the child's inability to make mature decisions. Typically, this conflict emerges in situations where a child seeks to exercise a potentially self-damaging right, such as abortion. In addition to the right to an abortion, the child has an interest in protection from physical and emotional harm resulting from an ill-considered, life-affecting decision. A delicate balance exists between the child's right to make an informed decision and the need to protect the child in cases where the decision could result in potentially damaging consequences. This latter protection often appears in the form of the parent's right of control. As one commentator put it, a child has a right "not to be abandoned to his [or her own] rights."²⁰³ This notion has gained wide acceptance among commentators in the United States.²⁰⁴

The Draft Convention reflects this tension. Draft article 9, which requires States Parties to insure the child's access to information, also requires States Parties to develop "appropriate guidelines for the protection of the child from information and material potentially injurious to his well-being. . . ."²⁰⁵ This provision equivocates considerably. It contains no statement of a child's right either to receive information

201. *Id.* art. 7.

202. *Id.* art. 14.

203. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605, 651 (1976) [hereinafter Hafen, *Children's Liberation*]. The current debate in the United States over the conflict between children's rights to independence and their need for protection is intense and covers the entire child care-child advocacy professional spectrum. Those who most strongly favor independence for children insist that children should possess rights entirely co-equal with those of adults. See R. FARSON, *BIRTHRIGHTS* (1974); J. HOLT, *ESCAPE FROM CHILDHOOD* (1974). For Farson this argument would include full citizenship rights, including the right to vote. *Id.* at 175-90. Other commentators, such as Professor Hafen, stress the child's reduced capacity and favor more emphasis upon the child's need for protection. See Hafen, *Puberty, Privacy and Protection: The Risks of Children's "Rights,"* 63 A.B.A. J. 1383 (1977); Landever, *The Rights of Children in America*, 5 POLY L. REV. 19 (1979); see also Freeman, *Rights of Children in the International Year of the Child*, 33 CURRENT LEGAL PROB. 1, 16-24 (1980); Geiser, *The Rights of Children*, 28 HASTINGS L.J. 1027 (1977).

204. See generally Hafen, *Children's Liberation*, *supra* note 203; Geiser, *supra* note 203; Landever, *supra* note 203. See also Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 992-93 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625 (1976).

205. Draft Convention, *supra* note 1, art. 9, para. d. Other draft articles also recognize the child's interest in protection from his actions but generally stop short of stating that interest as a right. See, e.g., *id.* art. 18 (requiring States Parties to protect children from hazardous working conditions); *id.* art. 18 bis (requiring States Parties to take appropriate measures to protect children from use of narcotic and psychotropic substances).

or protection from potentially harmful information, and is sufficiently vague to preclude enforcement. However, the child's interest in protection is at least identified. The Convention does not clearly define the relative weight of the child's conflicting interests or propose any standards for resolution of the conflict.

The tension between children's rights and interests, parent's right to control, and the State's interest in regulation contributes to the confusion over whether particular children's rights in fact exist and, if so, to what degree. The inescapable conclusion is that in the field of children's rights it is uncertain which rights exist, how those rights relate to each other, and how they interrelate with State, parent, and family rights. Because children's capacities are limited and children are particularly vulnerable and dependent upon others, their rights can be realistically developed only as part of a developing matrix of the rights of parents, families, and state.

VI. THE APPROACH OF THE CONVENTION DRAFTERS TO THE INTERNATIONALIZATION OF THE EMERGING PRINCIPLES AND IDEALS OF CHILDREN'S RIGHTS

A. OPTIONS FOR PROMOTING A CHILDREN'S RIGHTS AGENDA

Proponents of international children's rights faced with the uncertain status of those rights in both domestic and international law have three possible, though not necessarily mutually exclusive, courses for action: 1) wait for those rights to develop more completely and for the resolution of the internal conflicts through emerging state practice and developing domestic law; 2) proceed now to determine which children's rights should be internationally recognized, and codify them in a multilateral treaty; or 3) combine the first two approaches by formalizing in a multinational treaty rights that have reached or are close to the status of customary international law. Other, less universally accepted rights and interests would be refined and promoted through international conferences, literature, resolutions, declarations, and model codes.

The Draft Convention is a product primarily of the second of these options. The founders of the United Nations and the drafters of the great human rights instruments rejected the first option as the sole method of establishing international human rights after the Second World War. Although the third alternative may be the option most likely to preserve the authority of international law and to produce

It is perhaps draft article 15 that comes closest to recognizing a child's right to protection from his own action or inaction. That article recognizes the child's right to education and then obligates States to make primary education compulsory. *Id.* art. 15.

lasting benefits for international children's rights, an in-depth analysis of the normative process in international law is beyond the present scope of this Article.²⁰⁶ Rather, I will proceed to analyze the dangers inherent in the drafter's approach, demonstrate how those dangers are manifest in the emerging Convention, and suggest some methods by which those risks may be mollified, avoided, or controlled.

B. THE LEGISLATIVE IMPULSE AND ITS CONSEQUENCES

The Working Group's reports and the writings of commentators²⁰⁷ indicate that the intent and method of the drafters of the Convention is legislative.²⁰⁸ Thus, the Convention will serve to codify existing customary rules and maturing principles and, *in futuro*, "sow" standards that will themselves "crystalize into generally, legally binding international rules."²⁰⁹

The Working Group's Reports do not reveal whether that group has established, or even considered any criteria for judging whether a right proposed for inclusion has achieved any prior status in international law.²¹⁰ The Working Group established a proposed draft of children's rights as a working paper, and proceeded to debate and revise the contents of the proposed articles.²¹¹ This process has led to considerable revision and alteration of articles proposed both in tex-

206. See generally O. LISSITZYN, *INTERNATIONAL LAW TODAY AND TOMORROW* (1965); H. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* (1972); Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1977); Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1968); Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16 (1955); Pappas, *Introduction*, 13 COLUM. HUM. RTS. L. REV. xxvii, xxix-xxxvii (1981-1982); Ramcharan, *The Concept of Human Rights in Contemporary International Law*, 1983 CAN. HUM. RTS. Y.B. 267; Schachter, *The Crisis of Legitimation in the United Nations*, 50 NORDISK TIDSSKRIFT FOR INT'L RET. 3 (1981); Suy, *Innovations in International Law-Making Processes*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* (R. McDonald, D. Johnston & G. Morris eds. 1978).

207. Reports of the Working Group to the Commission on Human Rights on the drafting process are as follows: U.N. ESCOR (1468th mtg.) at 1, U.N. Doc. E/CN.4/L.1468 (1979); U.N. ESCOR (1542d mtg.) at 1, U.N. Doc. E/CN.4/L.1542 (1980); U.N. ESCOR (1575th mtg.) at 1, U.N. Doc. E/CN.4/L.1575 (1981); U.N. ESCOR at 1, U.N. Doc. E/CN.4/1982/L.41 (1982); U.N. ESCOR at 1, U.N. Doc. E/CN.4/1983/L.1 (1983); U.N. ESCOR at 1, U.N. Doc. E/CN.4/1983/L.1/Add.1 (1983); U.N. ESCOR at —, U.N. Doc. E/CN.4/1984/L.1 (1984); U.N. ESCOR at 1, U.N. Doc. E/CN.4/1985/64 (1985); U.N. ESCOR at 1, U.N. Doc. E/CN.4/1986/39 (1986). The most ardent legal and philosophical justifications for the legislative approach of the Working Group is found in Anna Pappas's Introduction to the UNITAR project on children's rights. Pappas, *supra* note 206; see also Cohen, *supra* note 188.

208. A number of commentators have reflected upon the trend in international law toward codification, of which the impulse to legislate previously unestablished norms is merely a part. See H. THIRLWAY, *supra* note 206; Baxter, *supra* note 206; Schachter, *supra* note 206; Suy, *supra* note 206. Thirlway refers to the general trend as "the movement towards an international *lex scripta*." THIRLWAY, *supra* note 206, at 1.

209. Pappas, *supra* note 206, at xxxiii.

210. See Reports of the Working Group, *supra* note 207.

211. See "Revised" Polish Draft, *supra* note 1.

tual clarification and substantive content, but it has been, with a few exceptions, remarkably devoid of critical discussion of the appropriateness of a proposed right for admission.²¹²

Though the wisdom of the legislative approach to the creation of international norms is currently the subject of intense debate,²¹³ it is a widely practiced and increasingly used method.²¹⁴ Aside from the wisdom and propriety of its divergence from the traditional and customary methods of norm development in international law,²¹⁵ this approach has inherent risks that do not bode well for an effective children's rights convention.

1. *Policy-ization of Children's Rights*

The most obvious risk in applying the legislative impulse to international human rights is that drafters denominate ideals, aspirations, and social policy as "rights." Critics suggest that when drafters step beyond time-tested maxims of international law and attempt to implement what the law *ought to be*, their approach may backfire.²¹⁶ This "policy-ization" of children's rights has several harmful ramifications in the emerging Convention.

a. *Vagueness.* The italicized language of the draft articles outlined below illustrates how the drafters' attempts to state aspirational policy as rights foster vagueness in the Convention:

[Draft] *Article 8*

212. The almost total lack of a critical approach to acceptance of rights for the Convention is illustrated by the fact that of the twenty-three draft articles approved by the Working Group at the end of its 1985 session, serious questions were raised to the appropriateness of only one: article 17, the right of children to rest and leisure. Draft Convention, *supra* note 1; Reports of the Working Group, *supra* note 207. Both the Federal Republic of Germany and Japan questioned the wisdom of proclaiming a universal right to rest and leisure for children. The proposed text was nevertheless approved, with Japan saving for itself the right to make a reservation clause to the proposed article. 41 U.N. ESCOR (Agenda Item 13) at 19-20, U.N. Doc. E/CN.4/1985/64 (1985) (Comm'n on Hum. Rts.).

213. See authorities cited, *supra* note 206.

214. See Baxter, *supra* note 206; Suy, *supra* note 206.

215. See generally, O. LISSITZYN, *supra* note 206; H. THIRLWAY, *supra* note 206; Lauterpacht, *supra* note 206. At the risk of overgeneralization, a significant difference between the legislative and the traditional approaches is the emphasis in the latter upon State practice, as opposed to pronouncements, as an essential source of customary international law. The traditional approach also requires wide acceptance of principles before they become the subject of General Assembly resolutions and multilateral treaties.

216. See H. THIRLWAY, *supra* note 206, at 24; Baxter, *supra* note 206, at 286; Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307 (1982); Ferguson, *Redressing Global Injustices: The Role of Law*, 33 RUTGERS L. REV. 410 (1981); Marks, *Emerging Human Rights: A New Generation for the 1980's?*, 33 RUTGERS L. REV. 435 (1981); see also Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171 (1969). The risks of non-consensus are discussed *infra* notes 233-35 and accompanying text.

1. . . . States Parties shall use their *best efforts* to ensure recognition of the principle that both parents have common and similar responsibilities for the upbringing and development of the child.

2. For the purpose of guaranteeing and promoting the rights set forth in this Convention, the States Parties to the present Convention shall render *appropriate assistance* to parents and guardians in the performance of the child-rearing responsibilities and shall *ensure the development of institutions for the care of children*.

3. States Parties shall take *all appropriate measures* to ensure that children of working parents have the right to *benefit* from child care services and *facilities for which they are eligible*.

4. The institutions, services and facilities referred to in paragraphs 2 and 3 of this article shall conform with the *standards established by competent authorities* particularly in the areas of safety, health, and in the number and suitability of their staff.

[emphasis added]

[Draft] Article 13

1. The States Parties to the present Convention shall, *in a manner appropriate to national conditions*, recognize for every child the right to *benefit* from social security and shall take the *necessary measures* to achieve the full realization of this right.

2. The benefits should, *where appropriate*, be granted *taking into account the national resources available* and the resources and the circumstances of the child and persons having responsibility for the child *as well as any other consideration relevant to an application for benefits* made by or on behalf of the child.

[emphasis added]

[Draft] Article 14

1. The States Parties to the present Convention recognize the right of every child to a *standard of living adequate for the child's physical, mental, spiritual, moral and social development*.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, *within their abilities and financial capacities* the conditions of living *necessary for the child's development*.

3. The States Parties to the present Convention, *in accordance with national conditions and within their means*, shall take *appropriate measures* to assist parents and others responsible for the child to implement this right and shall *in case of need* provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

[emphasis added]

It will be difficult for such vague language ever to "crystallize" into binding international law.²¹⁷ For example, in article 8, States Parties must take "appropriate measures." The article provides no guidelines, nor does it refer to any international standard of appropriateness. Furthermore, the article lacks guidelines on whether the State, the parents, or the "facility" determine eligibility.

These provisions are evidence of the danger of attempting to implement policy as proposed international norms. There is simply no accumulated base of common experience or understanding to infuse these amorphous phrases with a common meaning.

b. *Overbreadth*. When the drafters use the legislative method to implement policy, the result is often broad and lofty statements that

217. Pappas, *supra* note 206, at xxxiii.

obscure the provision's central purpose. Draft article 8, paragraph 3, outlined above, illustrates this overbreadth problem.

Stripped of its equivocations and qualifications, at its center, that article attempts to establish the "right" of children under the age of capability for self-care to be attended by either an adult or other person of demonstrated competence. So stated, this "right" is specific enough to imply a corresponding duty in parents and the State, which might find a basis in State practice and domestic law and upon which a universal understanding may be identified and maintained. If such an understanding exists and is codified in its most direct and simplest terms, it is likely to gain wider acceptance and have a more profound effect upon the behavior and actions of States. This is a further illustration of the maxim that would-be legislators should focus upon what *is* by consensus in international law rather than what they conceive *ought to be*.²¹⁸ Drafters would do well to establish a single rule people can understand and obey instead of establishing an entire code people cannot comprehend.

c. *Lack of comprehensive planning.* Because they are legislating "rights" without first subjecting those "rights" to tests of international status and acceptance, international legislators are free to lay the wand of legality upon practically any "right" that suits their fancy. Even under this open-ended approach comprehensive planning would help to determine which types of rights are desirable, which substantive areas should be covered, and which rights will add weight to the instrument as a whole. However, as one commentator has skillfully demonstrated, the legislative impulse and lack of comprehensive planning frequently go hand-in-hand.²¹⁹

Unfortunately, the Draft Convention appears to suffer from this combination of international legislating and lack of comprehensive planning. The Reports of the Working Group are void of any mention of significant comprehensive planning. The system for deciding which rights to consider appears arbitrary. The drafters worked from one or more base documents, primarily the Polish draft of 1979,²²⁰ and State delegations proposed additional articles in no particular order. These articles comprise an annual list of articles awaiting consideration at next year's work session.

This lack of planning has resulted in the omission of what would have been a logical first step: to determine whether and to what degree general human rights articles in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural

218. See *supra* note 216 and accompanying text.

219. Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984).

220. "Revised" Polish Draft, *supra* note 1.

Rights apply to children.²²¹ If the general articles of these two covenants apply, a substantial amount of the Convention drafters' work would have been clarified. Furthermore, the Working Group might derive from these existing instruments an indication of which children's rights have, or approach, universal recognition. Without this type of planning it is difficult to predict either the final content of the Convention or the likelihood for its acceptance by States.

d. *Dilution of established rights.* When the drafters label aspirations as "rights," it dilutes the label's meaning, weakens more substantial, established rights, and generally harms the cause of international human rights.

In the context of the Draft Convention, article 17, paragraph 1 provides an example. That article recognizes "the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts."²²² Roughly similar provisions relating to rest and leisure and participation in cultural life appear in both the Universal Declaration of Human Rights²²³ and the International Covenant on Economic, Social and Cultural Rights.²²⁴ However, both the Universal Declaration and the International Covenant present that right as a limitation upon the demands of employment.²²⁵ In that context, it assumes at least some definition and purpose. As it appears in the Draft Convention without that contextual limitation, this "right" is subject to open interpretation and, worse, to being ignored. In addi-

221. See Reports of the Working Group, U.N. ESCOR at 8, U.N. Doc. E/CN.4/1983/L.1 (1983) (U.S.S.R. proposal to include an article which secured rights of the international covenants to children—no agreement reached); — U.N. ESCOR — at 5, E/CN.4/1984/L.1 (1984) (further discussion of inclusion of rights in international covenants and other human rights instruments by reference). Article 21 of the Draft Convention, in typically vague terms, protects from interference and preemption by the Convention "any provisions that are more conducive to the realization of the rights of the child and that may be contained in, . . . (b) Any other international convention, treaty or agreement in force for that State." Draft Convention, *supra* note 1, art. 21. This of course sheds no light upon whether the rights proclaimed in the International Covenants apply to children.

222. *Id.* art. 17, para. 1.

223. Article 24 of the Universal Declaration provides: "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay." Universal Declaration of Human Rights, *supra* note 3, art. 24. Article 27 provides: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." *Id.* art. 27, para. 1.

224. Article 7 of the International Covenant on Economic, Social and Cultural Rights provides: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: . . . (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays." International Covenant on Economic, Social, and Cultural Rights, *supra* note 12, art. 7. Article 15(1) provides: "The States Parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications. . . ." *Id.* art. 15, para. 1.

225. See authorities cited *supra* notes 214-15.

tion, the Draft Convention version has the disturbing effect of equating the "right" of leisure with, for example, the right to be free from torture or the right to education and thereby diminishes the value of calling a concept a "right."²²⁶ Furthermore, it is predictable that the child's "right" to rest, leisure, play, and recreation will not be perceived as true rights by a large number of potential State Parties.²²⁷

Equating important, universally accepted rights with other less accepted rights will call into question the integrity of the Convention as a whole and the care with which it is being constructed. Doubts and reservations of this nature are life-threatening to a human rights instrument that depends on strong support from a number of internationally significant states, not only for its acceptance, but for its sustained effect.²²⁸

2. *Lack of Comprehensive Planning: Rights in Conflict*

As noted previously, the legislative impulse and lack of comprehensive planning frequently go hand-in-hand.²²⁹ Absence of planning is particularly risky in a children's rights convention because of the delicate interplay and potential for conflict between the rights of parents and children and interests of the state.²³⁰ The additional conflict among children's rights themselves and between those rights and the increasingly recognized rights of the family unit further complicates the planning and drafting processes.²³¹

226. Professor Alston states:

The challenge is to achieve an appropriate balance between, on the one hand, the need to maintain the integrity and credibility of the human rights tradition, and on the other hand, the need to adopt a dynamic approach that fully reflects changing needs and perspectives and responds to the emergence of new threats to human dignity and well-being.

Alston, *supra* note 219, at 609.

227. The Japanese and West German delegations to the Working Group on the Convention have given notice that they have serious doubts on whether rest and leisure are rights, or merely desirable social policy. *Supra* note 212.

228. Garibaldi, *The Legal Status of General Assembly Resolutions: Some Conceptual Observations*, in AM. SOC'Y INT'L L. PROC. 324, 327-28 (1979) (remarks of Prof. Myres McDougal).

229. Alston, *supra* note 219.

230. For articles in the Draft Convention in which potential conflict between the rights and interests of children and those of parents appears expressly or implicitly, see Draft Convention, *supra* note 1, arts. 3 (child's right to protection versus parents' right to responsibility and control), 7 (child's right to "express his views freely in all matters" versus parents right to control), 7 bis (child's right to freedom of thought, conscience and belief versus parents' right to control and parental and family rights to religious freedom and family unity), 8 bis (child's right to freedom from neglect and abuse versus parents' right to control), 9 (child's right of access to information versus parents' right to control), 11 (child's interest in adoption versus rights and interests of natural parents in possession and control of the child), 12 (interests of disabled child in special care versus parents' right to control), 15, 16 (child's right to education versus parents' right to control).

231. It is at least arguable that the United States Supreme Court has recognized the family unit as a repository of fundamental rights. See *Moore v. City of East Cleveland*, 432

Even though the potential for such conflicts cannot be avoided, comprehensive planning can avoid *unresolved* conflict, or provide a structure for its resolution. For example, draft article 7 bis provides in very expansive terms that children have the right to freedom of thought, conscience, and religion. This right is subject only to "necessary" laws and parental "direction."²³² Conferring on children the right to choose any religion "whatsoever" may lead to serious fragmentation of the family unit. As the child's rights to independence increase, the parent's rights to control, and the interests of the child, parents, and State in family unity decrease.

Therefore, the expansive terms of draft article 7 bis seem particularly ill-considered, and present a narrow and idyllic view of how families operate. Comprehensive planning might have avoided these pitfalls by establishing from the outset which right should take precedence and under what circumstances. The drafters should create a structure for resolving the question based on certain factors, such as the child's age, educational level, employment, economic independence, or other indicies of maturity. Alternatively, the child's right to freedom of thought and religion might appropriately be interposed against the State only, with the parents' rights to guide and control their children left unopposed. As drafted, however, article 7 bis may be read to propose that States Parties ensure the child's unfettered rights, but does not adequately address the resulting imposition on family unity and parental control. Perhaps the drafters should consider phrasing the right to freedom of thought, conscience, religion, and other such broad rights in terms of rights for all individuals and families and leave the conflict between parental control and children's rights to solution within the family. In any event, these are questions that require complex planning, and which cannot be adequately addressed in the Convention as presently conceived.

3. *Lack of Consensus and Danger of Non-acceptance*

The greatest danger resulting from the legislative impulse discussed above is that policy formalized as rights will not be acceptable to a significant number of States, or States will ratify the rights *pro forma*, and then ignore them. The Netherlands Delegation to the

U.S. 494 (1977); *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816 (1977). The family unit is also protected in international human rights instruments. See, e.g., Universal Declaration of Human Rights, *supra* note 3, arts. 12, 16; International Covenant on Civil and Political Rights, *supra* note 3, arts. 17, 23; International Covenant on Economic, Social and Cultural Rights, *supra* note 12, art. 10, para. 1; European Convention on Human Rights, *supra* note 53, art. 8; American Declaration of the Rights and Duties of Man, *supra* note 31, art. VI; American Convention of Human Rights, *supra* note 31, arts. 11, 17.

232. Draft Convention, *supra* note 1, art. 7 bis, para. 2.

Working Group has warned that the Draft Convention will only be effective if it is acceptable to a large number of States Parties,²³³ and Professor Myres McDougal suggests that international status of the approving States Parties is also vitally important.²³⁴ Under these conditions the legislation of international human rights, or international law in general, becomes something of a gamble. One noted commentator has expressed it in these terms:

The would-be codifier of international customary law should bear in mind that such law has something in common with a set of steppingstones laid in the bed of a stream. Provided the stones are sufficient in number and appropriately placed for it to be possible to get across dry-shod (i.e., the usual or frequent practical problems of inter-State relations can be solved), the gaps between the stones are of little importance. Codification involves the building of a bridge, which is only necessary if the stones are inadequate; and—to maintain the metaphor—if the bridge-builders disturb the stepping-stones without themselves achieving a solid structure of their own, the last state will be worse than the first.²³⁵

If the Convention aims too high for rights that, though meritorious, are undeveloped or of questionable content and purpose, the final result may be failure to get the Draft Convention ratified,²³⁶ as well as a lowering of international consciousness on children's rights.

4. *Conclusions on the Legislative Approach*

Proponents of the legislative approach to the Convention are certainly correct that this tact may both "crystallize" and help create desirable rules of international law.²³⁷ Scholars agree that in regard to

233. — U.N. ESCOR — at 3, U.N. Doc. E/CN.4/1984/L.1 (1984).

234. Garibaldi, *supra* note 228, at 328-29.

235. H. THIRLWAY, *supra* note 206, at 24.

236. Certain articles might severely hamper ratification, particularly in countries such as the United States where power over children and families is divided between federal and local authorities. See Draft Convention, *supra* note 1, arts. 3 (child's right to be heard in judicial and administration proceedings), 5 (obligation of States Parties to implement the Convention by appropriate legislative measures), 6 (right of child to reside with parents and to maintain contact with absent parent), 6 bis (right of child to contact with parent in another country), 8 (primary responsibility in parents to care for child and duty of States Parties to assist), 8 bis (duty of State Parties to protect child from abuse and neglect), 10 (duty of States Parties to provide care for child deprived of family environment), 11 (duty of States Parties to facilitate adoption), 12 (duty of States Parties to provide special care for mentally and physically disabled children), 12 bis (duty of States Parties to provide health care), 13 (right of child to benefit from social security), 14 (right of child to adequate standard of living), 15, 16 (right to education), 17 (right of child to rest and leisure and to participate in cultural life), 18 (right of child to protection from economic exploitation), 18 bis (duty of States Parties to protect child from substance abuse), 19 (juvenile court procedure and juvenile rehabilitation).

237. Pappas, *supra* note 206, at xxxiii. Ms. Pappas discusses in some detail theories behind the proposition that international human rights, being obligations *erga omnes* (against all States, as opposed to *between* States), are particularly appropriate for legislation and less dependent upon evolving practices between States. She cites the Universal Declaration of Human Rights and International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights as examples of how this process has begun in inter-

some of the most basic human rights, the Universal Declaration of Human Rights has done precisely that.²³⁸ However, the further this process extends to rights that do not have significant international consensus or other basis for State compliance, the more the risk increases. For example, the series of conventions on the laws of war that codified international humanitarian principles were an advance upon customary international law at the time the conventions were adopted and are now widely accepted by states.²³⁹ These conventions, however, were based upon reciprocal interests,²⁴⁰ and it is therefore to the contracting States' advantage to ratify and support the laws of war, because their citizens, as well as those of other States, are being protected.

This element of reciprocity is generally not present in most international human rights settings where the rights of individuals are pitted against *their own* States, instead of *all* States. It is even more tenuous where the individuals are children. For this reason the stakes in the legislative gamble are even higher for children's rights, and it is wise to proceed with particular caution once rule makers cross the threshold of the most basic and widely accepted human rights norms.

VII. SUGGESTIONS FOR RECTIFYING SOME OF THE ORGANIZATIONAL AND TEXTUAL PROBLEMS OF THE CONVENTION

A. ORGANIZATION: DETERMINING THE EFFECT OF EXISTING CONVENTIONS

As suggested previously, the Reports of the Working Group demonstrate a significant lack of comprehensive planning. The key step in planning should be to determine to what extent other human rights covenants protect children's rights. In particular, the drafters should carefully examine the International Covenants on Civil and Political Rights²⁴¹ and on Economic, Social and Cultural Rights²⁴² that are themselves comprehensive and purport universal coverage. If

national human rights, including the use of these instruments to develop customary international law. *Id.* at xxxii-xxxvii.

238. See generally *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795-98 (D. Kan. 1980); R. LILICH & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 65-68 (1979).

239. Baxter, *supra* note 206, at 280-86. Professor Baxter discusses both the Hague Conventions on the Laws and Customs of War and the Geneva Conventions for the Protection of War Victims.

240. The presence of this element as the cement that binds in the Hague and Geneva Conventions is discussed in J. PICTET, *THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 12 (1966); D. SCHINDLER, *THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND HUMAN RIGHTS* (1979).

241. International Covenant on Civil and Political Rights, *supra* note 3.

242. International Covenant on Economic, Social and Cultural Rights, *supra* note 12.

this examination reveals, as argued here, that the covenants apply in general to children, the drafters should delineate which of the covenant rights apply specifically to children, and establish which additional rights should be codified. Failure to take these steps may contribute significantly to confusion in the area and weaken children's rights.²⁴³

Draft Convention articles such as article 2 (right to name and nationality), article 6 (right to enter or leave a state), article 7 (freedom of speech), article 7 bis (freedom of thought, conscience, and religion), article 12 bis (health care and medical facilities), article 13 (right to Social Security), articles 15 and 16 (right to education), article 18 (protection from economic exploitation), and article 19 (procedural and rehabilitative rights under penal laws and the right against torture and degrading treatment), cover territory common to both the Convention and the covenants. The Convention should acknowledge the treaty provisions already in place, define how the established and newer provisions relate and designate any points of qualification or departure.²⁴⁴

243. In two of its paragraphs, the Preamble to the Convention refers to the International Covenants. Draft Convention, *supra* note 1; *see also infra* Appendix II, at 53-54. The first of these references paraphrases the non-discrimination clauses of the Covenants and the Universal Declaration of Human Rights. This occurrence might arguably be construed as indirect recognition that the rights in the Covenants apply to children. If this was the intent, it is an equivocal statement at best, and its possible implications upon the content of the Draft Convention have been largely ignored to date by the drafters. It seems more likely that these references acknowledge the debt the Draft Convention owes to the preceding documents, and serve as an invocation of the spiritual and philosophical legacy of those instruments. If the Working Group intends the Preamble to "vouch in" the general provisions of the Covenants, a much more direct and forceful statement to that effect is needed and considerable work should be undertaken to bring the Draft Convention and the Covenants into harmony.

244. This is particularly fertile ground for confusion. The drafters of the International Covenant on Civil and Political Rights, *supra* note 3, recognized this confusion, and did not include a child-specific article in that convention. *See supra* notes 165-66 and accompanying text. Some of the provisions in the Draft Convention parallel articles from the Covenants almost *in haec verba*. Compare Draft Convention, *supra* note 1, art. 1, para. 2(a) (requiring States Parties to ensure that "no child is . . . subjected to torture, cruel, inhuman or degrading treatment or punishment") with International Covenant on Civil and Political Rights, *supra* note 3, art. 7 ("No one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . ."). The International Covenant also states, "In particular, no one shall be subjected without his free consent to medical or scientific experimentation." *Id.* The Draft Convention apparently omits this sentence because the subject is covered in the Covenant. If so, there is no reason to include the right against torture and degrading treatment, which is also covered in the Covenant. The omission might imply that the right not to be subjected to scientific experimentation is not part of the right against inhuman or degrading treatment as that right appears in the Draft Convention. One might conclude that the drafters of the Convention do not believe that the basic rights in the Covenants apply to children.

The confusion also appears in article 7 of the Draft Convention, which attempts to secure against States the right of free expression "to the child who is capable of forming his own views . . . the wishes of the child being given due weight in accordance with his age and maturity." Draft Convention, *supra* note 1, art. 7. There is potential conflict between

More importantly, the Convention needs a comprehensive statement as to how the various human rights conventions interrelate in regard to children's rights.²⁴⁵ This is a complex undertaking but it is necessary to achieve a central purpose of the Convention—to define and clarify children's rights.

Tying the new Convention to some of the more established and time-tested rights of the covenants will lend strength to the status of children's rights and to the Convention itself. It will also ensure that some of the child's most basic and important rights, such as the right to life and not to be enslaved, covered in the Covenant on Civil and Political Rights,²⁴⁶ will not be weakened by their omission from the Convention.

B. CONTENT: CORRECTING THE PROBLEMS OF CONFLICTING RIGHTS AND INCLUSION OF RIGHTS OF QUESTIONABLE MERIT

Recall the textual problems in the Convention discussed above, particularly the failure to address the potential conflicts between rights (draft articles 7 bis and 9), inclusion of rights of questionable substance and merit (draft articles 9 and 17), and vagueness and overbreadth in articulation of the "right" (draft articles 6 ter, 8, 13 & 14). We have also examined the draft articles singly and attempted to appraise their individual content.²⁴⁷ The following broad organizational and planning adjustments to the Convention address some of the problems exposed in the preceding discussions and, if adopted, will add precision to the structure and content of the Convention and clarify the relation of the Convention to other instruments.

the qualifiers in this draft article and article 19(2) of the Covenant on Civil and Political Rights, *supra* note 3, art. 19, para. 2, which accords an essentially unequivocal right to free expression to everyone.

245. Draft article 21 of the Draft Convention, which refers generally to non-interference with other treaties, does not accomplish this. Draft Convention, *supra* note 1, art. 24; *see generally supra* note 221. There is evidence from the Reports of the Working Group that some form of statement on the relationship between the Draft Convention and the Covenants is contemplated by at least some of the delegates. *Id.* Such a statement should go substantially beyond a simple inclusion by reference of the Covenants or some portion thereof in the Draft Convention. The drafters should seize the opportunity to clarify which rights in the Covenants apply to children and to what degree.

246. International Covenant on Civil and Political Rights, *supra* note 3, arts. 6, 8.

247. Other commentators have appraised individual articles as well. *See* Schweitzer, *A Children's Rights Convention—What is the United Nations Accomplishing*, in *THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS*, Third Sokol Colloquium (R. Lillich ed. 1981). Schweitzer's comments are upon the articles of the basic working document, the "Revised" Polish draft, which have since undergone substantial modification by the Working Group. *See also* Pappas, *supra* note 206, at xi-xiv.

1. *Combatting Vagueness, Overbreadth, and Conflicting Rights*

In order to resolve these problems, the drafters must expand the scope of the Convention. They must scrutinize children's rights in the larger context of the rights and interests of parents, children and families, and the State with a view to establishing some concept of the interdependent relation of the various rights and of the relative weight of the competing interests. This cannot be done in the context of a convention limited solely to children's rights. The encroachment of the interests of parents and families into some of the articles of the Draft Convention,²⁴⁸ as well as vagueness and equivocation in some of those articles in the expression of children's rights, indicates that this is so.

Therefore, the first step in the planning process should be to decide whether the desired goal is a convention on children's rights and correlative duties, or a convention on the rights of children, parents and families. The drafters must expand the scope of the Convention to cover the full panoply of rights implicated. This is the only solution to the problems of interdependent and conflicting rights which promotes the cause of children's rights in an orderly and harmonious fashion.

2. *Minimizing the Diluting Effect of Questionable Rights*

At this juncture there is clearly no turning back from the essential legislative approach to establishing international children's rights. The Working Group has already bypassed comprehensive procedures for "quality control," such as those suggested by Professor Philip Alston,²⁴⁹ though some of the substantive tests he proposes might still

248. The Draft Convention mentions parental rights and duties as explicit or implicit qualifiers of the rights of the child or as inhibitors to encroachment by the State, or both at a number of places. See Draft Convention, *supra* note 1, arts. 3 (rights and duties of parents as qualifiers of undertaking of State Parties to ensure protection and care for the child), 6 (rights of parents versus the state rights to determine child's residence), 7 bis (rights and duties of parents as qualifiers to child's right to practice religion of choice), 8 (rights of parents to raise child), 9 (rights of parents to raise child, as set out in article 8, incorporated into article 9 as qualifier on right of child to receive information and mass media benefits). The rights of parents also appear obliquely in a number of other articles. *Id.* arts. 4, para. 2 (as qualifiers on discrimination by the state against children for the status or beliefs of parents), 6, 6 bis (rights of parents to contact with child as corresponding to child's explicit right to contact with absent parents), 8, para. 3 (rights of working parents to child care facilities as corresponding to explicit right of child of working parents to child care), 11, para. 1 (right of natural parents to custody of child and necessity for waiver thereof before adoption), 12 bis (right of parents to health care information as corollary to child's right to health care), 13, para. 2 (right and duty of parents to care for child as qualifier on state duty to provide welfare benefits).

At least one draft article appears to place directly upon parents a duty to the child. *Id.* art. 14, para. 2. See generally *supra* note 2.

249. Alston, *supra* note 219, at 617-20. Professor Alston suggests a seven-step procedure, including in-depth preliminary study of the proposed norm, its basis in international

be applied to individual rights which are presently approved or under consideration.²⁵⁰

Therefore, the Working Group should now proceed carefully to minimize the ill effects of juxtaposing "rights" that are essentially statements of aspirational policy, such as the right to rest and leisure, with the more established rights, such as the right to life. Resolving the dilution problem will have important effects on enforcement²⁵¹ and, as discussed before, ratification of the Convention.²⁵²

To address this problem, the drafters have two options. First, they may eliminate rights of questionable value, such as the right to rest and leisure, and vague rights that carry no enforceable standards, such as those in articles 8, 13, and 14 discussed above. Second, they might consider bifurcating the Convention between aspirational and fundamental rights.²⁵³ The second option appears preferable because

practice and its effect upon existing human rights; comments from governments and international, regional and non-governmental organizations; a study of a Working Group report; recommendation by the Commission on Human Rights and final consideration by the General Assembly.

250. The substantive tests proposed by Professor Alston for judging whether international principles are ripe for codification are that they:

- reflect a fundamentally important social value; —be relevant, inevitably to varying degrees, throughout a world of diverse value systems;
- be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law;
- be consistent with, but not merely repetitive of, the existing body of international human rights law;
- be capable of achieving a very high degree of international consensus;
- be compatible or at least not clearly incompatible with the general practice of states; and
- be sufficiently precise as to give rise to identifiable rights and obligations.

Id. at 615.

251. See International Covenant on Civil and Political Rights, *supra* note 3, arts. 40-42; Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 5, U.N. Doc. A/6316 (1966). Although enforcement under the Covenant on Civil and Political Rights could hardly be termed exemplary, the options under that convention provide more force than those under the International Covenant on Economic, Social and Cultural Rights, *supra* note 12. In addition, provisions roughly similar to those in the Covenant on Civil and Political Rights have proved more effective when implemented on a regional level. See European Convention on Human Rights, *supra* note 53.

252. Recall the West German and Japanese objections to the right to rest and leisure, discussed *supra* note 212. Careful planning will avoid this problem. Before adopting a proposed right, the drafters should at least ask 1) whether the proposed right is of sufficiently cohesive substance and content to permit practical application; 2) whether it is a right upon which nations can agree; and 3) whether it is a right which nations will actively support.

253. Professor Theodor Meron has emphasized that distinguishing between "fundamental civil rights" and other rights may not always be an easy task and that consistent, universal standards for that purpose do not exist. Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 5-13 (1986). Nevertheless, he recognizes that quality differentiation between "ordinary" and "higher" rights is a desirable goal, particularly in gaining wide acceptance of and protection for rights of the latter variety. *Id.* at 22. A

some of the social and economic rights, although lacking universal recognition and enforceability, are still important and warrant inclusion in the Draft Convention.²⁵⁴

Bifurcation of the Convention may be accomplished in any number of ways. From the perspective of the Draft Convention, the most effective approach is one that protects the integrity of the "harder" civil and economic rights from dilution by the "softer" rights. The International Covenants²⁵⁵ provide a precedent. Such an approach would require the drafting of two separate conventions. The conventions would be related in subject matter and overall purpose, but distinct in the types of rights they promote and the degrees of enforcement procedure proposed to secure compliance. This approach would thus promote the "softer" rights in a formal convention and minimize their diluting and confusing effects on the more fundamental and more enforceable civil rights. The drafters might also consider a model code, or refining the Declaration on the Rights of the Child, in order to avoid completely abandoning some of the "softer" rights. Either bifurcation of the Convention in this fashion or elimination of the "softer" and less explicit rights from the Convention altogether is preferable to the confusion and textual anarchy inherent in the present document.

VIII. CONCLUSION

Because children are the world's most vulnerable people, there is an understandable desire to cover them with the widest possible degree of protection. This approach may be appropriate in a domestic context where social customs are widely shared, a common understanding of standards and language exists, and enforcement machinery and resources are available. However, it is a precarious undertaking in an international arena where standards and resources vary widely and enforcement machinery is either tentative or nonexistent.

hierarchical distinction between fundamental civil rights and social and economic rights is not necessary to achieve the organizational changes I recommend. Nevertheless, the differentiation between those types of rights, particularly in terms of enforcement procedures, will be beneficial for essentially the same purposes that Professor Meron endorses. In the case of the Draft Convention, a rough line of demarcation already exists between rights that resemble political and civil rights and those which more closely resemble economic, cultural and social rights.

254. For example, these would include the rights to health care, to a reasonable standard of living, and to special care for physically and mentally disabled children. Poor health care and malnutrition still take heavy tolls of the world's children. *See generally* J. GRANT, *THE STATE OF THE WORLD'S CHILDREN* (1986). That study shows, for example, that 44 percent to 52 percent of the children in Ghana aged 7 to 44 months were severely to moderately malnourished. *Id.* at 77.

255. International Covenant on Civil and Political Rights, *supra* note 3; International Covenant on Economic, Social and Cultural Rights, *supra* note 12.

In the area of international law the importance of the content of the legal norm increases because recognition, observance, and compliance, to a much greater degree than in the domestic area, depend upon the integrity of the norm itself. The norm becomes the focus and bears most of the weight. Where a right is part of a broad instrument containing other rights, and is part of a larger scheme of instruments seeking the same general end, the need for integrity includes not only the necessity for integrity of individual rights, but also mutual support and harmony among rights and the instruments in which they are contained.

Promulgation of written children's rights in this context, then, should begin with a comprehensive understanding of the broader scheme of international human rights, careful planning upon how the new norms will fit the scheme, and testing of the proposed norms for both content and form to ensure that they can carry the weight they are expected to bear.

The drafting of the Convention on the Rights of the Child has to date omitted much of this process. Instead, it has emphasized coverage of substantive areas rather than planning and scrutiny of content. While this methodology has brought to light long neglected areas of concern, there is a serious question, both as a matter of tactics and international law, whether this should be the primary function of a multilateral convention.

As the legislative approach has already been chosen and is underway, the drafters should take essential steps to see that their labors reach the results they seek and are not counterproductive and self-conflicting. The suggestions advanced in this Article are elementary and require some retracing of steps, but they may yet be undertaken. If they are, the proposed resolutions will receive the stature and effect of the Convention without serious threat to its substantive coverage, and will further enhance the cause of international children's rights.

APPENDIX I.

Declaration of the Rights of the Child

Preamble

Whereas the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Whereas the United Nations has, in the Universal Declaration of Human Rights, proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Whereas the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,

Whereas the need for such special safeguards has been stated in the Geneva Declaration of the Rights of the Child in 1924, and recognized in the Universal Declaration of Human Rights and in the statutes of specialized agencies and international organizations concerned with the welfare of children,

Whereas mankind owes to the child the best it has to give,

Now therefore,

The General Assembly

Proclaims this Declaration of the Rights of the Child to the end that he may have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth, and calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles:

Principle 1

The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

Principle 2

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the

enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

Principle 3

The child shall be entitled from his birth to a name and a nationality.

Principle 4

The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

Principle 5

The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition.

Principle 6

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

Principle 7

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

Principle 8

The child shall in all circumstances be among the first to receive protection and relief.

Principle 9

The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

Principle 10

The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

APPENDIX II.
TEXT OF THE DRAFT CONVENTION ON THE
RIGHTS OF THE CHILD ADOPTED BY
THE WORKING GROUP

Preamble

The States Parties to the Convention,

Considering that in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the basic unit of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that, as indicated in the Declaration of the Rights of the Child adopted in 1959, the child due to the needs of his physical and mental development requires particular care and assistance with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security,

Recognizing that the child, for the full and harmonious development of his personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Bearing in mind that the need for extending particular care to the child has been stated in the Geneva Declaration on the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the United Nations in 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the

International Covenant on Economic, Social and Cultural Rights (in particular in its article 10) and in the statutes of specialized agencies and international organizations concerned with the welfare of children,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom and brotherhood,

Have agreed as follows:

Article 1

According to the present Convention a child is every human being to the age of 18 years unless, under the law of his State, he has attained his age of majority earlier.

Article 2

1. The child shall have the right from his birth to a name and to acquire a nationality.
2. The States Parties to the present Convention shall ensure that their legislation recognizes the principle according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, or administrative authorities, the best interests of the child shall be a primary consideration.
2. In all judicial or administrative proceedings affecting a child that is capable of forming his own views, an opportunity shall be provided for the views of the child to be heard, either directly or indirectly through a representative, as a party to the proceedings, and those views shall be taken into consideration by the competent authorities, in a manner consistent with the procedures followed in the State Party for the application of its legislation.
3. The States Parties to the present Convention undertake to ensure the child such protection and care as is necessary for his well-being, taking into account the rights and duties of his parents, legal guardians, or other individuals legally responsible for him, and, to this end, shall take all appropriate legislative and administrative measures.
4. The States Parties to the present Convention shall ensure competent supervision of officials and personnel of institutions directly responsible for the care of children.

Article 4

1. The States Parties to the present Convention shall respect and extend all the rights set forth in this Convention to each child in their territories without distinction of any kind, irrespective of the child's or his parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national or social origin, family status, ethnic origin, cultural beliefs or practices, property, educational attainment, birth, or any other basis whatever.

2. States Parties to the present Convention shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or other family members.

Article 5

The States Parties to the present Convention shall undertake all appropriate administrative and legislative measures, in accordance with the available resources, and, where needed, within the framework of international co-operation, for the implementation of the rights recognized in this Convention.

Article 6

1. The States Parties to the present Convention recognize that the child should enjoy parental care and should have his place of residence determined by his parent(s), except as provided herein.

2. States Parties shall ensure that a child shall not be separated from his parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures [sic], that such separation is necessary for the best interests of the child. Such a determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. Such determinations shall not be made until all interested parties have been given an opportunity to participate in the proceedings and to make their views known. Such views shall be taken into account by the competent authorities in making their determination.

3. A child who is separated from one or both parents has the right to maintain personal relations and direct contacts with both parents on a regular basis, save in exceptional circumstances.

4. Where such separation results from any action initiated by a State party [sic], such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with essential information

concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 6 bis

1. In accordance with the obligation of States Parties under Article 6, paragraph 2, applications by a child or his parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis save in exceptional circumstances personal relations and direct contacts with both parents.

Article 6 ter

1. The States Parties to the present Convention shall take appropriate measures to combat the illicit transfer and nonreturn of children abroad.
2. To this end, the States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements, as well as the introduction of periodic consultations between the competent national authorities.

Article 7

The States Parties to the present Convention shall assure to the child who is capable of forming his own views the right to express his opinion freely in all matters, the wishes of the child being given due weight in accordance with his age and maturity.

Article 7 bis

1. The States Parties to the present Convention shall respect the right of the child to freedom of thought, conscience and religion.
2. This rights shall include in particular the freedom to have or to adopt a religion or whatsoever belief of his choice and freedom, either individually or in community with others and in public or private, to manifest his religion or belief, subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health and morals, and the right to have access to education in the matter of religion or belief.
3. The States Parties shall respect the rights and duties of the parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his right in a manner consistent with the evolving capacities of the child.
4. The States Parties shall equally respect the liberty of the child and his parents and, where applicable, legal guardians, to ensure the religious and moral education of the child in conformity with convictions of their choice.

Article 8

1. Parents or, as the case may be, guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common and similar responsibilities for the upbringing and development of the child.
2. For the purpose of guaranteeing and promoting the rights set forth in this Convention, the States Parties to the present Convention shall render appropriate assistance to parents and guardians in the performance of the child-rearing responsibilities and shall ensure the development of institutions for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child care services and facilities for which they are eligible.
4. The institutions, services and facilities referred to in paragraphs 2 and 3 of this article shall conform with the standards established by competent authorities particularly in the areas of safety, health, and in the number and suitability of their staff.

Article 8 bis

1. The States Parties to the present Convention shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 9

The States Parties to the present Convention recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, including those aimed at the promoting of his social, spiritual and moral well-being and physical and mental health. To this end, the States Parties shall:

- (a) Encourage the mass media agencies to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 16;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the mass media agencies to have particular regard to the linguistic needs of the child who belongs to a minority group or an indigenous population;

(d) Encourage the development of appropriate guidelines for the protection of the child from information and material potentially injurious to his well-being bearing in mind the provisions of article 8.

Article 9 bis

1. The States Parties to the present Convention undertake to respect the right of the child to preserve his or her identity (nationality, name, family relations as recognized by law) without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, the States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

Article 10

1. A child permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance provided by the State.

2. The States Parties to the present Convention shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his family environment, or who in his best interests cannot be brought up or be allowed to remain in that environment shall be provided with alternative family care which could include, *inter alia*, adoption, foster placement, or placement in suitable institutions for the care of children.

Article 11

1. The States Parties to the present Convention shall undertake measures, where appropriate, to facilitate the process of adoption of the child. Adoption of a child shall be authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if required, the appropriate persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

2. The States Parties to the present Convention shall take all appropriate measures to secure the best interests of the child who is the subject of intercountry adoption. States Parties shall ensure that placements are made by authorized agencies or appropriate persons under the adequate supervision of competent authorities, providing the same safeguards and standards that are applied in exclusively

domestic adoptions. The competent authorities shall make every possible effort to ensure the legal validity of the adoption in the countries involved. States Parties shall endeavor, where appropriate, to promote these objectives by entering into bilateral or multilateral agreements.

Article 11 bis

The States Parties to the present Convention shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in this Convention and other international human rights or humanitarian instruments to which the said States are Parties. In view of the important functions performed in refugee protection and assistance matters by the United Nations and other competent intergovernmental and non-governmental organizations, the States Parties to the present Convention shall provide appropriate co-operation in any efforts by these organizations to protect and assist such a child and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with his family. In cases where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason, as set forth in the present Convention.

Article 12

1. The States Parties to the present Convention recognize that a mentally or physically disabled child should enjoy a full and decent life in conditions which ensure his dignity, promote his self-reliance, and facilitate his active participation in the community.
2. The States Parties to the present Convention recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration

and individual development, including his cultural and spiritual development.

4. States Parties shall promote in the spirit of international co-operation the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 12 bis

1. The States Parties to the present Convention recognize the right of the child to the enjoyment of the highest attainable standard of health and to medical and rehabilitation facilities. The States Parties shall strive to ensure that no child is deprived for financial reasons of his right of access to such health care services.

2. The States Parties to the present Convention shall pursue full implementation of this right and in particular, shall take appropriate measures to:

- (a) diminish infant and child mortality,
- (b) ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care,
- (c) ensure appropriate health care for expectant mothers,
- (d) encourage the provision of full and accurate information regarding methods of infant nutrition, including the advantages of breast-feeding,
- (e) ensure the provision of information and training for parents and children in basic health care, sanitation and prevention of accidents,
- (f) develop preventive health care and family planning education and services.

3. States Parties to the present Convention undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in this article. In this regard, particular account shall be taken of the needs of developing countries.

Article 12 ter

States Parties to the present Convention recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection, or treatment of his or her physical or mental

health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 13

1. The States Parties to the present Convention shall, in a manner appropriate to national conditions, recognize for every child the right to benefit from social security and shall take the necessary measures to achieve the full realization of this right.
2. The benefits should, where appropriate, be granted taking into account the national resources available and the resources and the circumstances of the child and persons having responsibility for the maintenance of the child as well as any other consideration relevant to an applicant for benefits made by or on behalf of the child.

Article 14

1. The States Parties to the present Convention recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. The States Parties to the present Convention, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

Article 15

1. The States Parties to the present Convention recognize the right of the child to education and, with a view to achieving the full realization of this right on the basis of equal opportunity, they shall, in particular:
 - (a) make primary education free and compulsory as early as possible,
 - (b) encourage the development of different forms of secondary education systems, both general and vocational, to make them available and accessible to all children, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need,
 - (c) make higher education equally accessible to all on the basis of capacity by every appropriate means.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner reflective of the child's human dignity.
3. The States Parties to the present Convention shall respect the rights and duties of the parents and, where applicable, legal guardians

to provide direction to the child in the exercise of his right to education in a manner consistent with the evolving capacities of the child.

4. States Parties to the present Convention shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 16

1. The States Parties to the present Convention agree that the education of the child shall be directed to:

(a) The promotion of the development of the child's personality, talents and mental and physical abilities to their fullest potential and the fostering of respect for all human rights and fundamental freedoms.

(b) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance and friendship among all peoples, ethnic and religious groups.

(c) The development of respect for the natural environment and for the principles of the Charter of the United Nations.

2. No part of paragraph 1 of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 17

1. States Parties to the present Convention recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. The States Parties to the present Convention shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 18

1. The States Parties to the present Convention recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. The States Parties to the present Convention shall take legislative and administrative measures to ensure the implementation of this arti-

cle. To this end, and having regard to the relevant provisions of other international instruments, the States Parties shall in particular:

- (a) provide for a minimum age or minimum ages for admission [sic] to employment;
- (b) provide for appropriate regulation of the hours and conditions of employment; and
- (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this article.

Article 18 bis

The States Parties to the present Convention shall take all appropriate measures, including legislative, social and educational measures, to protect children from the illegal use of narcotic and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illegal production and trafficking of such substances.

Article 19

1. States Parties to the present Convention recognize the right of children who are accused or recognized as having infringed the penal law to be treated in a manner which is consistent with promoting their sense of dignity and worth and intensifying their respect for the human rights and fundamental freedoms of others, and which takes into account their age and the desirability of promoting their rehabilitation.

2. To this end, and having regard to the relevant provisions of international instruments, the States Parties to the present Convention shall, in particular, ensure that:

- (a) no child is arbitrarily detained or imprisoned or subjected to torture, cruel, inhuman or degrading treatment or punishment;
- (b) capital punishment or life imprisonment without possibility of release is not imposed for crimes committed by persons below 18 years of age;
- (c) children accused of infringing the penal law (i) are presumed innocent until proven guilty according to law;
- (ii) are informed promptly of the charges against them and, as of the time of being accused, have legal or other appropriate assistance in the preparation and presentation of their defence;
- (iii) have the matter determined according to law in a fair hearing within a reasonable period of time by an independent and impartial tribunal and
- (iv) if found guilty are entitled to have their conviction and sentence reviewed by a higher tribunal according to law.

3. An essential aim of treatment of children found guilty of infringing the penal law shall be their reformation and social rehabilitation.

A variety of dispositions, including programmes of education and vocational training and alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate and proportionate both to their circumstances and the offence.

4. All children deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person, and shall in particular:

- (a) be brought as speedily as possible for adjudication;
- (b) be separated from adults accused or convicted of having committed an offence unless it is considered in the child's best interest not to do so, or it is unnecessary for the protection of the child; and
- (c) have the right to maintain contact with their family through correspondence and visits, save in exceptional circumstances.

Article 20

1. The States Parties to the present Convention undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties to the present Convention shall take all feasible measures to ensure that no child takes a direct part in hostilities and they shall refrain in particular from recruiting any child who has not attained the age of 15 years into their armed forces.
3. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties to this Convention shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 21

Nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

- (a) The law of a State Party; or
- (b) Any other international convention, treaty or agreement in force for that State.